No. 11861

United States

Circuit Court of Appeals

For the Ninth Circuit.

J. D. GREGG,

Appellant,

vs.

HENRY WALLACE WINCHESTER, ERNEST JOSEPH STEWART, et al.,

Appellees.

Transcript of Record

In Two Volumes

VOLUME II

Pages 313 to 634

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

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EXHIBIT C

Excerpts from Minutes of the Council of the City of Los Angeles Meeting held October 2, 1946

(Vol. 321, Pages 374-376, incl. File No. 24473)

The Planning Committee reported as follows:

In the matter of communication from the City Planning Commission relative to appeal of John D. Gregg from the decision of said Commission in denying his application for conditional use for the excavation of rock, sand and gravel on real property in the San Fernado Valley bounded generally by Wicks Street, Dronfield Avenue and its southerly extension, Pendleton Street and Glenoaks Boulevard, more particularly described in said application, as amended, of said communicant to the said Commission and known as City Plan Case No. 962.

In accordance with provisions of the zoning ordinance, your Committee conducted a public hearing on this matter whereat proponents and opponents of the question were heard and although a considerable number of protests were filed, after careful consideration of all the facts presented and a study of same, it is our opinion that the said use should be permitted.

We therefore recommend in accordance with the requirements of the zoning ordinance that the Council make the following written findings of fact:

The Council finds that the findings of the City Planning Commission on which said Commission's

decision was based denying this application were in error for the following reasons:

1. That the property involved is situated in a district, the character of which is unsuited for residential purposes.
2. That the land in question is composed of gravel beds and is primarily suitable only for production of sand, rock and gravel.
3. That the proposed use of this property is deemed essential to the public convenience and welfare and is in harmony [102] with the various elements or objectives of the master plan.
4. That under the conditions to be imposed the proposed use would not be detrimental to surrounding developments and would not adversely affect individual property rights or interfere with the enjoyment of property rights of property owners in the vicinity or affect any legal right of such property owners.
5. While there are about 450 acres of rock bearing land in M-3 zones in the area only 23,000,000 tons are available to existing plant facilities and this amount is not sufficient to meet public and private demand for rock aggregates.

We further find from the foregoing reasons that the public necessity, convenience, and general welfare require that this appeal be granted and the conditional use be permitted as requested subject to the following conditions:

1. That the applicant construct a 6-foot cyclone type mesh wire fence around the said property, including barbed wire on the top of said fence providing the Fire Department grants permission for same.
2. That no permanent plant building or structure be installed or maintained on said property and that all material excavated be mined by an electrically powered shovel and primary crusher and transported by a conveyor belt system running through a tunnel or tunnels under Glenoaks Boulevard to the plant now owned and operated by applicant, lying southwesterly of said Boulevard and processed at said plant.
3. That a setback line of fifty feet from all property lines and existing streets be maintained and that slopes of excavations be maintained at one foot to one foot.
4. That the area between all property lines or street line and 50 foot setback be screen planted progressively as excavations proceed.

We Further Recommend that permission be granted to said applicant to make such excavations in Glenoaks Boulevard as may be [103] necessary to install and house the necessary conveyor belts, such excavations to be made in accordance with specifications of and at the location approved by the Board of Public Works.

Mr. Rasmussen moved, seconded by Mr. Henry, that said report as read be adopted.

Mr. Warburton moved, seconded by Mr. Rasmussen, that twenty minutes be allotted to each side to present their case.

Which motion was adopted by a unanimous vote.

Thereupon Mr. John D. Gregg, appellant, addressed the Council and made a statement as to past operations of his company, and of the demand for rock and gravel at the present time.

Mr. Jakson Wheeler, home owner and representing other property owners, thereupon addressed the Council in opposition to granting the application.

Mr. Paul McMahon of the Board of Education and Mr. George Hjelts of the Playground and Recreation Department, addressed the Council speaking in opposition to granting the permit owing to hazardous conditions that will be created.

Mr. Davis then moved, seconded by Mr. Warburton, that Mr. H. P. Cortelyou, Director of the Bureau of Maintenance and Sanitation, be requested to attend the Council session and speak upon the question.

Which motion was adopted by a unanimous vote.

While awaiting Mr. Cortelyou's attendance at the Council session, Mr. Henry moved, seconded by Mr. Rasmussen, that ten minutes be allotted to the appellant for rebuttal.

Which motion was adopted by a unanimous vote.

Whereupon, Mr. Clyde Harrell, representing the appellant, and Mr. Robert Mitchell, President of the Consolidated Rock Products Company, again reiterated the necessity of granting the application.

Mr. Cortelyou then being present in the Council Chamber, addressed the Council stating that anything he might say was his [104] own opinion as an individual and as Director of the Bureau of Maintenance and Sanitation and that he was not appearing in behalf of, or by authority of, the Board of Public Works.

Mr. Cortelyou stated that if there is not a sufficient supply of aggregate in the San Fernando Valley available for use upon City work, it would be necessary to secure same from greater distances, which would necessarily increase the length of haul and undoubtedly increase the cost to the City.

Mr. Warburton then moved, seconded by Mr. Rasmussen, that further consideration of the matter be continued until the meeting of the Council to be held December 3, 1946, and in the meantime the City Engineer be instructed to make a survey of available supplies of rock and sand deposits in the San Fernando Valley and report thereon to the City Council.

Upon calling the roll the members voted as follows: Ayes—Messrs. Holland, Warburton and President Moore (3); Noes—Messrs. Austin, Bennett, Christensen, Cronk, Davenport, Davies, Harby, Henry, Rasmussen and Timberlake (10).

The President declared the motion to continue failed of adoption, and instructed the Clerk to call the roll on the adoption of the report of the Committee, and upon calling the roll the members voted as follows: Ayes—Messrs. Austin, Bennett, Cronk,

Davenport, Davies, Harby, Henry, Holland, Rasmussen, Timberlake and President Moore (11); Noes—Messrs. Christensen and Warburton (2).

The President declared the committee report adopted. [105]

Certification

State of California,
County of Los Angeles—ss.

I, Walter C. Peterson, City Clerk of the City of Los Angeles and ex-officio Clerk of the City Council of the City of Los Angeles, do hereby certify and attest the foregoing to be a full, true and correct copy of the original excerpt from the minutes of the Council of the City of Los Angeles at its meeting held October 2, 1946 (File No. 24473), on file in my office, and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of the City of Los Angeles this 6th day of December, 1946.

WALTER C. PETERSON,
City Clerk of the City of
Los Angeles,

By /s/ A. M. MORRIS,
Deputy. [106]

EXHIBIT D

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 522031

JACKSON EARL WHEELER, PATRICK ADAMS, W. L. CALLEY, D. H. CALLEY, ARCHIE I. WAY, LILLIAN LEWIS, W. R. SHADLEY, C. T. WINKLER, DONALD KERSEY, CHARLES WISE, WILLIAM F. BORROWE, T. O. EASLEY, R. E. BERTELL, BETSY ROSS, GEORGE J. KING, FRANK E. WRIGHT, B. R. FONDREN, ROBERT D. HOPKINS, FRANK LUTIZETTI, DWIGHT MOORE, LOUISE R. TAYLOR, FRANK J. SMYTHE, C. C. CAMPBELL, HELEN CHURCHWARD, PAUL C. BROWN and WEST COAST WINERY, INC., a corporation,

Plaintiffs,

vs.

J. D. GREGG, and the CITY OF LOS ANGELES, a municipal corporation,

Defendants.

Oliver O. Clark and Robert A. Smith, 818 Garfield Building, Los Angeles 14, California, Trinity 9457, Attorneys for Plaintiffs.

COMPLAINT IN EQUITY FOR INJUNCTION, AND DAMAGES FOR TORTIOUS CONDUCT

Plaintiffs complain and allege:

I.

That said defendant City of Los Angeles, is, and

at all times herein mentioned, was, a municipal corporation organized and existing as such under a municipal charter.

That said defendant John D. Gregg is the owner and in possession of that certain real property, comprising about one hundred and fifteen acres situated in the City of Los Angeles, County of Los Angeles, State of California, described as follows, to wit: [107]

> Lots 1, 2, 4, 5, 6, 7, 13 and 14 in Block 19; and Easterly 150 feet of Lot 12 in Block 8; Lots 4 to 9, inclusive, and Lots 15 to 19, inclusive, and Lots 21 and 22, and the Easterly 280 feet of Lot 14, in Block 17; of the Los Angeles Land and Water Company's subdivision of a part of the Maclay Rancho as per map recorded in Book 3 of Maps at Pages 17 and 18 in the Office of the County Recorder of Los Angeles County, California.

That said land, colored in red and designated as the "Critical Area," is shown upon a map marked Exhibit "A" which is hereunto attached and made a part hereof. That said land is hereinafter referred to as the "Critical Area."

II.

That said map is a substantially correct representation of the area covered thereby upon a scale of one inch to each one thousand lineal feet thereof. That the area upon said map which is enclosed within a red line, which line is not more than about

three thousand feet from the various extremities of said "critical" area, and upon the westerly side thereof, follows the easterly boundary of an area shaded in yellow which is designated as an "Unrestricted Area," is herein referred to as the "Community" area, said "Community" area being about one and one-half square miles. The entire area shown upon said map is herein referred to as the "Map" area. That as a convenience in folding, the top of said map as attached hereto is west.

That each of the areas confined by narrow parallel lines and designated as a named street upon said map, is, and for more than five years continuously last past, has been, a public highway regularly dedicated, improved, and used as such. That said public highways which are shaded in green upon said map, are, and for more than five years continuously last past, have been, improved with a concrete pavement. That said paved highways within said "Community" area are [108] seven and eighty-four hundredths miles in length, and the improved highways within said area are five and one-half miles in length.

That the area shaded in green and designated as a "Community Park" upon said map, contains fifteen acres of land, and is, and ever since 1928, has been, a public park, improved and maintained as such by the Park Department, and under the management of the Playground Commission, of said defendant City of Los Angeles, and extensively used as such by the inhabitants of the area shown upon said map.

That the area shaded in green and designated as a "School" upon said map, contains about four acres, and is, and continuously since during the year 1942, has been, a public kindergarten and elementary grade school, improved and maintained as such by the Board of Education of said defendant City of Los Angeles, and used as such by the pupils of kindergarten and elementary grade age residing in said community.

That the areas shaded in green upon said map, and designated, respectively, as "Community Chapel" and "Community Church," which church is on the Sunland Boulevard, are, and for more than one year continuously last past, have been, owned, improved, and used, as places of public worship for the residents of said "Community" area, and the area shaded in green, marked "Community Church," and which lies between said "School" and said "Park," upon said map, is, and for more than six months last past, has been, under improvement as a place for public worship.

That the area lying westerly of Randall Street, and southerly of the southerly line of said "Community" area, which line parallels Glenoaks Boulevard, is, and ever since about February, 1933, has been, zoned as an "M-3" district.

That said defendant John D. Gregg began during, or about, the year 1934, and subsequent thereto has accomplished, the excavation of rock, sand and gravel upon about thirty-five acres of a sixty-two acres tract of land, owned by him, and lying within said M-3 zone and distant about three hundred feet

southerly from said Glenoaks Boulevard, and immediately southerly of [109] the boundary of said "Community" area as it passes that portion of said "Critical" area which extends southerly from Glenoaks Boulevard. That said defendant maintains upon said land, machinery, equipment, and other facilities, for the excavation of such materials and the processing thereof for market.

That all of the areas shaded in black upon said map, are, and on October 2, 1946, were, and most of them have been for more than five years continuously last past, improved, occupied, and used, as family homes for human residents. That said homes number three hundred and fifty nine within said "community" area, and nine hundred and ninety two within the area covered by said map.

That the lands shaded in yellow and designated as an "Unrestricted" area upon said map, and the easterly boundary of which is the westerly boundary of said "Community" area, lie within the natural channel of an ancient water course commonly known as the east brand of the "Tujunga Wash," and are, and always have been, unrestricted as to their use for the commercial production of rock, sand and gravel.

III.

That during the year 1907 the Los Angeles Land and Water Company, a California corporation, hereinafter referred to as the "Land Company," was the owner and in possession of a tract of land comprising about three thousand acres, which included the land lying within said "Community"

area, and the lands lying within said "Unrestricted" area, and other lands adjacent to said areas.

That during said year, and while the owner of said lands, said land company caused said lands to be surveyed and classified in respect of their natural adaptability for residential, horticultural, and agricultural development and use, and for the commercial production of rock, sand, and gravel.

That in and by said survey and classification said land company classified the lands lying within said "Unrestricted" area [110] as naturally adapted to the commercial production of rock, sand, and gravel, and classified the remainder of its lands, including the lands situated within said "Community" area as naturally adapted to residential, horticultural, and agricultural, development and use.

That the commercial production of rock, sand, and gravel, was then, at all time since has been, and now is, the highest, best, and most valuable, use to which said lands so classified for such use, as aforesaid, were adapted, for the reasons that said lands lie within the natural channel of said ancient water course; are constituted of rock, sand, and gravel of commercial quality and in commercial quantity, which materials are overlaid with a very thin structure of unproductive soil, or are altogether exposed, and that a pit excavated thereon for the production of said materials is susceptible to refilling by the discharge of water, rock, sand, and gravel, which occurs annually in the upper reaches of said water course.

That the residential, horticultural, and agricultural, development and use of said lands, including

all of the lands within said "Community" area, so classified for such use, as aforesaid, then was, at all times since has been, and now is, the highest, best, and most valuable, use to which said lands are adapted, for the reasons that said lands do not lie in the natural channel of any water course; are overlaid with a stratum, several feet thick, of rich sandy loam; are upon a gently sloping plane with a slightly undulating surface, and are within an area of moderate climatic changes, and of climatic conditions favorable for human residence and for plant growth.

That there are now, and for more than one year continuously last past there has been, more than 1650 persons residing within said "Community" area, and more than 7500 persons residing within said "Map" area. That 218 of the 1650 persons residing within said "Community" area, now are, and on October 2, 1946, were, children between the ages of four years and thirteen years and 110 of said 1650 persons are, and on said date were, children between the ages [111] of twelve years and seventeen years.

IV.

That thereafter, during the year 1914, said land company executed a contract for the sale to Fernando Valley Development Company, a corporation, of about twenty-two hundred acres of said land, including the lands within said "Community" area, so classified as best adapted to residential, horticultural, and agricultural development and use, as

aforesaid, and thereupon, and during said year, said corporations caused to be prepared, executed, and recorded in the office of the County Recorder of Los Angeles County, California, a declaration in writing, by which the commercial production of rock, sand, and gravel, within or upon said lands so classified as best adapted to residential, agricultural, and horticultural development and use, was prohibited for a period of twenty years thence next ensuing. That said restrictions remained in full force and effect throughout said twenty-year period.

V.

That on or about the 16th day of February, 1916, said defendant City enacted its Ordinance Number 33,761, whereby it adopted and declared a plan for the zoning of all real property within its corporate limits, and classified all land not otherwise zoned, whether then within the corporate limits of said city, or thereafter annexed thereto, as adapted to residential development and use, and prohibited operations for the commercial production of rock, sand, and gravel, upon such lands. That said zoning ordinance number 33,761 remained in force and effect until superceded by Ordinance Number 74,142 enacted by said defendant City, and which became effective on October 27, 1934.

That thereafter, to wit, on the 11th day of April, 1918, the lands which comprise said "Map" area, and a large body of other lands adjacent thereto on all sides, were annexed to said defendant city.

That the zoning provisions of said zoning ordinance number 33,761 prohibited the conduct of operations for the commercial production of rock, sand, and gravel, within and upon the lands which comprise said "Community" area, between the date of said annexation, to wit, April 11, 1918, and the effective date of said superceding zoning ordinance Number 74,140, to wit, October 27, 1934.

That thereafter, to wit, on or about September 26, 1934, said defendant city adopted its Zoning Ordinance Number 74,140, which ordinance became effective on October 27, 1934, and which by its terms provided that it superceded said Zoning Ordinance Number 33,761, of February 16, 1916, and all amendments thereto, and variances granted thereunder.

That said Ordinance Number 74,140, of October 27, 1934, as aforesaid, classified the lands which comprise said "Community" area, as adapted to residential development and use, and prohibited the conduct of any operation within or upon said lands for the commercial production of rock, sand, and gravel. That said ordinance remained in force and effect until superceded by Ordinance Number 90,500 enacted by said defendant city on March 7, 1946, and which became effective on June 1, 1946.

VI.

That C. S. Smith and Wm. Evans made written application to said Planning Commission for a variance permit to conduct operations for the commercial production of rock, sand, and gravel, upon lots

9 and 10, in block 22, within said "Community" area. That said application was denied by said Planning Commission, by the unanimous votes of its members, on August 24, 1934.

That thereafter Claire Schweitzer made written application to said Planning Commission for a variance permit to conduct operations for the commercial production of rock, sand, and gravel upon lots 5, 6, 7, 13, and 14, in block 19, within said "Community" area. That said application was denied by said Planning Commission, by the [113] unanimous votes of its members, on July 7, 1936. That an appeal was taken by said applicant, from said denial, to the City Council of said defendant city, and upon September 18, 1936, said appeal was denied by said City Council. That the land as to which said variance permit was sought, comprises about twenty-five acres and lies in about the center of said "Critical" area.

That thereafter H. I. Miller made written application to said Planning Commission for a variance permit to conduct operations for the commercial production of rock, sand, and gravel upon lots 9 and 10 in block 22, within said "Community" area. That said application was denied by said Planning Commission, by the unanimous votes of its members, on August 5, 1936.

That thereafter Ray Schweitzer made written application to said Planning Commission for a variance permit to conduct operations for the commercial production of rock, sand, and gravel, upon lots 5, 6, 7, 13, and 14, in block 19, within said

"Community" area. That the land as to which said variance permit was sought, comprises about twenty-five acres and lies in about the center of said "Critical" area. That said application was denied by said Planning Commission by the unanimous votes of its members, on July 7, 1939. That an appeal was taken by said applicant, from said denial, to the City Council of said defendant city, and upon September 25, 1939, said appeal was denied by said City Council.

That thereafter said defendant John D. Gregg made written application to said Planning Commission for a variance permit to conduct operations for the commercial production of rock, sand, and gravel upon lots 12 and 24 in block 18, within said "Community" area. That said application was denied by said Planning Commission, by the unanimous votes of its members, on January 25, 1940. That said lot 12 of the land as to which said variance permit was then denied, is that part of said "Critical" area which lies southerly of Glenoaks Boulevard.

That thereafter F. H. Haines made written application to [114] said Planning Commission for a variance permit to conduct operations for the commercial production of rock, sand, and gravel, upon lot 7, in block 20, within said "Community" area. That said application was denied by said Planning Commission by the unanimous votes of its members on March 11, 1941.

That thereafter Sam and Pauline Katz made written application to said Planning Commission

for a variance permit to operate a riding academy upon a parcel of land 170 feet wide and 470 feet deep, at number 9821 Stonehurst Avenue, at the junction of said avenue with Art Street, within said "Community" area, and that said application was denied by said Planning Commission by the unanimous votes of its members, on November 26, 1945.

VII.

That during, or about, the year 1928, residents within said "Community" area, and in territory adjacent thereto, petitioned the Park Commission of said defendant city, that an election be called for the purpose of voting upon a proposition to issue bonds as a lien upon the real property within said area, to secure money with which to purchase land within said "Community" area, and to improve the same as a public recreation and assembly center. That thereupon said election was called and held, and said bond issue was approved, and the bonds thus authorized were issued and sold.

That thereupon the area which contains about fifteen acres, and which is shaded in green and designated "Community Park," upon said map, and which lies immediately across a forty foot street from said "Critical" area, was purchased by said Park Commission, and was improved with landscaping and plantings; outdoor recreational facilities, and an Administration and Community Club House building, fully furnished. That said building, last named, was erected in 1931, and today it would cost about $50,000 to duplicate. That the cost

of said land and improvements was in excess of $50,000 and they could not be duplicated now for less than, and are reasonably worth, [115] $100,000. That the monies obtained from said bond issue, together with other monies available to said Park Commission were used for the purchase and improvement of said property.

That a substantial part of the principal sum of said bonds is unpaid. That said unpaid balance will mature in installments, annually, during the twelve years next ensuing, and constitutes a lien upon all of the real property within said "Community" area including the lands owned by each of the plaintiffs named herein, and the numerous other persons within said area, similarly situated, on whose behalf and for whose benefit this action is begun and maintained.

That at the time when the residents of said "Community" area petitioned for said election, and voted for said bonds, as aforesaid, they knew, and the facts were, that the land holdings of said land company had been surveyed, classified, and restricted, as aforesaid, and that said defendant city, by the enactment of its zoning ordinance, as aforesaid, had prohibited any extension within said "Community" area, of any operation for the commercial production of rock, sand, and gravel, within said area, as aforesaid, and that lands within said "Community" area had been sold, and were being sold, upon and subject to said restrictions and zoning which prohibited the conduct thereon of any operation for the commercial production of rock,

sand, and gravel, as aforesaid, and that said "Community" area was being developed and used as a residential area, in reliance, upon said restrictions and prohibitions.

That at the time of the making of said petition, and the voting of said issue of bonds, said residents of said "Community" area understood and believed, by reason of the matters herein alleged, that said "Community" area would continue to be developed and used as a residential area within which operations for the commercial production of rock, sand, and gravel, would be prohibited, and had it not been for such understanding and belief said petition would not have been made, and said bonds would not have been voted. [116]

That the recreational facilities established, as aforesaid, have been maintained constantly since their inception, and are now maintained, under the management and supervision of the Playground Commission of said defendant city, and they always have been, and are, extensively patronized and used by the residents of said "Community" area, and of the territory adjacent thereto, including numerous children of kindergarten and elementary grade school ages. That the attendance upon said facilities by said residents during the year last past has been, and now is, from a minimum of 110 to a maximum of 800 persons each day, and from a minimum of 1000 to a maximum of 2000 persons each week.

VIII.

That for many years prior to the year 1942, and until abandoned during that year, as herein alleged, the Los Angeles City Board of Education maintained and conducted a public kindergarten, and elementary grade school, commonly known and referred to as the Remsen Avenue School, on Remsen Avenue, now Glenoaks Boulevard, at the northeast corner of its junction with Truesdale Avenue, adjacent to said "Unrestricted" area. That the site of said school prior to its abandonment, as herein alleged, is shown upon said map as a hatched area designated as "Abandoned School."

That during the year 1942, residents of the area, including said "Community" area, whose children attended said Remsen Avenue School, requested said Board of Education to abandon said Remsen Avenue School because of its proximity to prospective permissible operations for the commercial production of rock, sand, and gravel, and the hazards to said pupils incident to such operations, including the excavation and maintenance of deep pits dangerously attractive to children of kindergarten and elementary grade school age; the heavy trucking traffic, and the noise and dust incident to such production and trucking operations, and to establish a new kindergarten and elementary grade school within said "Community" area, as a replacement for [117] said abandoned school. That prior to the abandonment of said Remsen Avenue School, as herein set forth, there was no public school located within said "Community" area.

That at the time when said request was made it was known to the residents of said area who made said request, and to a very large number of other residents of said "Community" area who were interested in the maintenance of safe school conditions for the children of kindergarten and elementary grade school age who resided in said "Community" area, and to the members of said Los Angeles City Board of Education, and the facts were, that continuously for more than twenty-eight years immediately theretofore, the owners and subdividers of the lands lying within said "Community" area, and, subsequent to the annexation of said area to said defendant city in 1918, the Planning Commission; the Playground Commission; the Board of Education, and the City Council of said defendant City of Los Angeles, had declared and maintained, as aforesaid, a policy of prohibiting within said "Community" area, any extension of operations for the commercial production of rock, sand, and gravel, and of encouraging by said policy of restriction, the development of said "Community" area as a residential district wherein the children residing within said area could attend upon and use the facilities of any school; churches; recreational park, and roadways leading thereto, established and maintained in said "Community" area, as herein set forth, with a minimum risk of dangers incident to heavy trucking traffic upon the highways, and the proximity of deep and dangerous pits excavated in the commercial production of rock, sand, and gravel, and attractive to children of kinder-

garten and elementary school grade ages, and the dust, dirt, and noises, which customarily and inevitably resulted, and result from such operations.

That at the time of said request, the residents within the area served by said Remsen Avenue School, which included the residents of said "Community" area, and the Board of Education; the Planning [118] Commission; the Park Commission; the Playground Commission; and the City Council, of said defendant City of Los Angeles, knew, and the fact was, that the establishment and maintenance of places frequented by the public, including schools; playgrounds; churches; assembly halls, and highways, in a vicinity wherein deep and extensive pits were excavated, and other operations were conducted, in the commercial production of rock, sand, and gravel, was extremely inadvisable because human experience taught that such operations in such a community, had theretofore constituted, and then constituted, and would continue to constitute, a very serious hazard to the safety, well being, and comfort, of the residents of such a community, and particularly to children of kindergarten, and elementary grade school, age, to whom the presence of such conditions was prejudiciously attractive, and was prejudicial to the general public welfare, health, and safety.

That upon receiving said request for the abandonment of said Remsen Avenue School, and the establishment of a kindergarten and elementary grade school within said "Community" area, for the reasons herein stated, said Board of Education

informed said defendant City of Los Angeles of said request, and of the reasons therefor as herein stated, and inquired of said defendant as to the permanency of its policy to prohibit any extension within said "Community" area, of operations for the commercial production of rock, sand, and gravel, which policy was evidenced by said zoning law enacted in 1916, and by said city's denial of said six applications for variance permits in 1934; 1936; 1939; 1940, and 1941, respectively, as hereinbefore set forth, and was informed by said defendant city, that it was the permanent policy of said city to prohibit within said "Community" area, and to exclude therefrom, any extension of any operation for the commercial production of rock, sand, and gravel, and to encourage the development and use of said "Community" area for residential purposes.

That said Board of Education, and the residents of the area served by said Remsen Avenue School, including the residents of said "Community" area, believed the representations of said defendant City of Los Angeles, made as aforesaid, and relied thereupon, and, in such belief and reliance, and for the reasons herein stated, and not otherwise, said Remsen Avenue School was abandoned in 1942, and, during said year, a new school, known as the "Stonehurst" School, was constructed and placed in use upon land, comprising about four acres, then purchased for that purpose, by said Board of Education, within said "Community" area. That the land so purchased, improved, and used for said school, is shown upon said map by a green shading

designated as "School." That said school is within six hundred feet of said "Critical" area.

That said school opened in 1942 with an enrollment of 221 pupils of kindergarten, and elementary grade age. That the number of pupils enrolled in said school has constantly increased, and the present enrollment thereat is 418.

IX.

That during the years 1945 and 1946, said defendant City of Los Angeles, made an extensive resurvey and study of its master plan of zoning the area within its municipal boundaries, including the area involved herein, lying in what is commonly known and referred to as the San Fernando Valley.

That upon the conclusion of said resurvey and study, said defendant city, acting through its agencies as prescribed by law, including its Planning Commission; Engineering Department, City Council, and Mayor, determined, and concluded, that the general public welfare; health; safety; comfort, and convenience, and the welfare; health; safety; comfort, and convenience, of the residents within said "Community" area, justified and required a continuance of said zoning restriction upon any extension within said "Community" area, of any operation for the commercial production of rock, sand, and gravel, [120] and thereupon, and on March 7, 1946, said defendant city enacted its Ordinance No. 90,500 wherein and whereby the zoning restrictions then upon said "Community" area were restated and continued, and any extension of any operation

for the production of rock, sand, and gravel, within said "Community" area, was prohibited, unless thereafter it should be shown to the satisfaction of said defendant city, that such use was then essential or desirable to the public convenience or welfare, and was then in harmony with the various elements and objectives of the Master Plan of Zoning as adopted by said city, and a variance permit for such an operation should be first obtained from said defendant city. That said zoning ordinance became effective on June 1, 1946, and is, and at all times since its effective date, as aforesaid, has been, in full force and effect.

X.

That under, and by reason of, the encouragement derived from the natural adaptability of the land lying within said "Community" area, to residential development and use, and the restrictions imposed thereon and maintained, by private restriction and governmental zoning, as aforesaid, against any extension within said "Community" area of any operation for the commercial production of rock, sand, and gravel, said "Community" area developed by steady and substantial growth and improvement up to October 2, 1946, into, and on said date it was, a predominately and substantial residential community, embracing within its area of about one and one-half square miles, more than 360 homes of a reasonable value in excess of $2,500,000; more than 1500 residents including more than 328 children over four, and under sixteen, years of age; public

kindergarten and elementary grade school facilities of a reasonable value in excess of $50,000; public recreational and park facilities of a reasonable value in excess of $100,000; church facilities of a reasonable value in excess of $25,000; an American Legion Hall; a well equipped medical clinic; nearly eight miles of concrete paved highways; adequate water, gas, [121] and electrical service, and reasonable motor transportation.

XI.

That during the fifteen years immediately preceding October 2, 1946, in contemplation of its residential development and use, restricted and zoned, as aforesaid, as its highest and most valuable use, the market value of land within said "Community" area, increased from about five hundred dollars per acre, to about five thousand dollars per acre, and the assessed valuation of said lands, for public taxation, was progressively and substantially increased, and during the year 1946, and prior to the application of said John D. Gregg for a variance permit, as herein alleged, the assessed valuation of said lands for public taxation, was increased by twenty-five per cent to one hundred and twenty-five per cent of its then assessed valuation for taxation.

XII.

That during, or about, the month of September, 1941, said defendant John D. Gregg became the president and active manager of said Los Angeles

Land and Water Company, and ever since said date he has held, and now holds, said offices.

That plaintiffs are informed and believe, and therefore allege, that said defendant John D. Gregg at the time when he succeeded to the office of president of said land company, as aforesaid, was, and ever since has been, and now is, the owner of a substantial interest in said land company.

That plaintiffs are informed and believe, and therefore allege, that at the time when said defendant John D. Gregg acquired his said interest in said land company, he knew that the land lying within said "Community" area had been originally owned; classified, and restricted as to its use, by said land company, and had been zoned by said defendant city, as herein alleged, and that the major part thereof had been sold by said land company for residential, horticultural, and agricultural, development and use, and had been, [122] and was devoted to such use.

XIII.

That during a period of about five years immediately last past, said defendant John D. Gregg acquired by purchase, in several separate parcels and at several different times, the land which comprises about one hundred and fifteen acres, and constitutes said "Critical" area within the heart of said "Community" area, as shown upon said map.

That at the time when said defendant John D. Gregg purchased each of said parcels of land which

now constitute said "Critical" area, as aforesaid, said defendant knew that said land had been classified in 1914 by said land company, as best adapted to residential, horticultural and agricultural development and use, as herein alleged, and he knew that said land had been restricted as to its use, by said land company, and by said zoning ordinances enacted by said defendant city prior to the year 1946, as herein alleged, and he knew that each of said six applications to said defendant city for a variance permit to conduct operations for the commercial production of rock, sand, and gravel, within said "Community" area had been made, and that three of said applications involved lands purchased by him and situated within said "Critical" area, as aforesaid, and that said applications had been denied, as herein alleged, and he knew that other applications for variance permits to erect improvements and conduct operations that were not of a residential nature, as set forth in paragraph sixth hereof, had been made, and denied by said defendant city, as hereinbefore alleged.

That at the time when said defendant John D. Gregg purchased said lands, as aforesaid, he also knew, and the facts were, that within said "Community" area a substantial and progressive community of homes; schools; churches, and public parks, recreation facilities, and other places of public assembly, had been developed and was maintained, as herein alleged, in reliance upon said restrictions, and the permanency [123] of the zoning

which prohibited any extension within said area of operations for the commercial production of rock, sand, and gravel, as herein alleged, and that in such reliance said community of homes had been provided, with reasonable adequacy, at great public and private expense, as herein alleged, with about eight miles of paved highways; kindergarten, and elementary grade school facilities; with church facilities; with community recreational and park facilities; with an American Legion Hall; with a Medical Clinic; with motor transportaton; with water, gas, and electrical service, and with fire protection, and that in consequence of said restrictions and zoning, and of said development and use, of said lands, the intrinsic value, and the market value, and the assessed value for purposes of taxation, of lands within said "Community" area, had substantially appreciated, as herein alleged, and that said lands were in substantial demand for residential development and use.

That plaintiffs are informed and believe, and therefore allege, that at the time when he purchased said lands, said John D. Gregg intended upon the completion thereof to apply to said city for a variance permit to enable him to excavate said lands for the commercial production of rock, sand, and gravel, and that in his purchase of said lands, as aforesaid, said John D. Gregg did not contract therefor in his own name, but secretly contracted therefor in the names of dummies acting for him,

and that he concealed from the vendors of said lands at the times of such purchases, his intention to apply for a variance permit under said zoning laws to enable him to conduct operations thereon for the commercial production of rock, sand, and gravel, and actively encouraged said vendors to believe that said purchases were being made for the purpose of developing and using said lands for residential purposes. That no one of said vendors would have sold his said land, as aforesaid, if he had known that the purchase thereof was actually for the benefit of said John D. Gregg, and that he intended to apply for said variance permit, as aforesaid. [124]

XIV.

That at the time when said defendant John D. Gregg purchased said lands which comprise said "Critical" area, as aforesaid, said defendant knew, and the facts then were; ever since have been, and now are, that any substantial operation upon said land within said "Critical" area for the commercial production of rock, sand, and gravel, would create, and constitute, a very substantial, serious, and dangerous, hazard and detriment to the general public welfare, health, and safety of the community within said "Community" area, and to the inhabitants of said community, and would substantially and materially interfere with, interrupt, disturb, and impair, the use, and comfortable enjoyment, of their respective properties within said "Community"

area, by the owners, and by the inhabitants, of said properties, respectively, and would substantially depreciate the intrinsic value, and the reasonable market value, of all of the lands lying within said "Community" area, and would create a reasonable apprehension that such operations would eventually result in a substantial erosion of the highways abutting upon said "Critical" area, and of the lands abutting upon said highways immediately opposite said "Critical" area, and that such operations would be prejudicial to the general public welfare, and conveniences, and would not be in harmony with the various elements, or objectives, of the Master Plan of Zoning as adopted by said defendant city.

XV.

That subsequent to the purchase by said defendant John D. Gregg, of said parcels of land which now comprise said "Critical" area, as aforesaid, and subsequent to the enactment of said zoning ordinance by said defendant city in March, 1946, said defendant John D. Gregg, notwithstanding his knowledge of facts and events as herein alleged, applied to the Planning Commission of said defendant city, for a variance permit to conduct operations for the commercial production of rock, sand, and gravel, from and upon said lands purchased and owned by him, as aforesaid, and which comprise said "Critical" area.

That in support of his said application, said defendant John D. Gregg represented to said City of

Los Angeles, that the property constituting said "Critical" area and as to which said defendant John D. Gregg then sought said variance permit, was situated in a district the character of which was unsuited for residential purposes; that said land was composed of gravel beds, and was primarily suitable only for production of rock, sand, and gravel; that his proposed use of said property was essential to the public convenience and welfare, and was in harmony with the various elements or objectives of the master plan of zoning as enacted by said defendant city, as herein alleged; that his proposed use of said lands would not be detrimental to the developments surrounding the lands as to which said variance permit was sought, and would not adversely affect individual property rights, or interfere with the enjoyment of property rights of property owners in the vicinity of said "Critical" area, or affect any legal rights of such property owners; that while there were about 310 acres of rock bearing land in M-3 zones in the San Fernando Valley area, only 23,000,000 tons were available to existing plant facilities, and that this amount was not sufficient to meet public and private demands for rock aggregates, and that, therefore, the public necessity, convenience, and general welfare, required that said permit be granted.

XVI.

That at the time when said representations were made by said defendant John D. Gregg, as aforesaid, each of said representations was false and un-

true, and said defendant John D. Gregg then well knew that each of said representations was false and untrue.

That at the time when said application was made by said defendant John D. Gregg, it was a fact, and a matter of public record, that since the year 1935, twenty children who had been attracted to the gravel pits created in said San Fernando Valley by the commercial production of rock, sand, and gravel, had accidentally lost their [126] lives in said pits, and that more than fifty children, similarly attracted, had sustained serious injuries, accidentally, in said pits.

That said facts were of such common knowledge in said San Fernando Valley at the time when said application was made, that it is a reasonable inference that said John D. Gregg well knew thereof.

XVII.

That thereafter, to wit, on August 20, 1946, after a public hearing; an inspection of the property, and a thorough consideration of all the facts presented, the Planning Commission of said defendant city, by the unanimous vote of its members, denied said application, and contrary to representations of John D. Gregg, stated that it found that the property as to which said variance permit was sought, could be utilized for residential purposes as evidenced by the residential development in the immediate neighborhood of said land; that the then

existing zoning which prohibited the commercial production of rock, sand, and gravel, from or upon the lands as to which said permits was sought, was an appropriate zoning for said property and for the general area in which said property was situated; that the proposed use of said lands would interfere with a reasonable enjoyment by a substantial number of property owners in that vicinity, of their homes and community facilities; that the extensive excavations and pits which would be left after operations had been completed for the commercial production of rock, sand, and gravel, upon and from said lands as to which said variance permit was sought, would create an unsightly and dangerous condition which would be detrimental to the public welfare, and particularly to the public safety, and would leave said land in a condition unsuited for any use in keeping with other properties in said community, and that to permit an extension of such operations upon the property as to which said variance permit was requested, would not serve any public convenience, and would adversely affect individual property rights in that community, and would interfere with the normal growth of said community, and would conflict with the objectives of the Master Plan of Zoning as incorporated in said [127] zoning ordinances enacted by said defendant city, as herein stated.

XVIII.

That thereafter said defendant John D. Gregg appealed to the City Council of said defendant city,

from said denial by said City Planning Commission of his said application, and thereafter, to wit, on October 2, 1946, said City Council granted said application.

That said grant of said application was made upon the following conditions, to wit:

1. That the applicant construct a 6-foot cyclone type mesh wire fence around the said property, including barbed wire on the top of said fence providing the Fire Department grants permission for same.

2. That no permanent plant building or structure be installed or maintained on said property and that all material excavated be mined by an electrically powered shovel and primary crusher and transported by a conveyor belt system running through a tunnel or tunnels under Glenoaks Boulevard to the plant now owned and operated by applicant, lying southwesterly of said Boulevard and processed at said plant.

3. That a setback line of fifty feet from all property lines and existing streets be maintained and that slopes of excavations be maintained at one foot to one foot.

4. That the area between all property lines or street lines and 50 foot setback be screen planted progressively as excavations proceed.

XIX.

That said granting of said application was accomplished by the affirmative vote of eleven members of said City Council who, within the eight months immediately preceding said grant, had voted for the adoption of said zoning ordinance No. 90,500 on March 7, 1946, [128] and, who, thereby had found and determined, upon an exhaustive resurvey and study of zonal planning in the San Fernando Valley, that the conditions and developments within said "Community" area justified and required for the promotion of the public welfare; the preservation of public health and safety, and the protection of property rights, that any extension of operations for the commercial production of rock, sand, and gravel, within said "Community" area, should be prohibited.

That no change of any kind or character occurred during the period of less than eight months between the enactment of said zoning ordinance and said grant of said application for a variance permit, or between the enactments of said two zoning ordinances in 1916 and 1946, respectively, which tended in any way to alter, or otherwise affect, the conditions upon which it had been found and determined in the enactments of said Zoning Ordinances, that the general public welfare, convenience, and safety, and the welfare and safety of the inhabitants of the community in which said "Critical" area is located, and the preservation of the property rights of the inhabitants of said "Community" area, required a continuance of the prohibition of such operations within said "Community" area.

That at the time when said application by said John D. Gregg for said variance permit, was made, and was pending, and at the time when said application was granted by said City Council, as aforesaid, it was a definite improbability, and always had been a definite improbability, that any practical difficulty, or any unnecessary hardship or result inconsistent with the general purposes of any of said Zoning Ordinances, would result from the strict and literal interpretation and enforcement of the provisions of said Zoning Ordinances.

That there was not during said period, and never has been, any exceptional or extraordinary circumstance or condition, applicable to the property, or to the intended use of the property, as to which said variance permit was sought and obtained, as aforesaid, that did not apply generally to the property or class of uses in the same district or zone.

That such a variance was never necessary for the preservation or enjoyment of any substantial property right of said John D. Gregg possessed by other property in the same zone and vicinity.

That there never was a time within the fifteen years, and longer, immediately last past, when it would not have been materially detrimental to the public welfare, or injurious to the property or improvements, in the zone or district in which the land which comprises said "Critical" area is located, to grant such a variance permit, or when the granting of such a variance permit would not adversely affect the Master Plan of said Zoning Ordinances.

That the conduct of the eleven members of said City Council at the session of said City Council whereat said appeal of said defendant John D. Gregg was considered, and said variance permit was granted, and who controlled the deliberations and action of said City Council in respect of said matter, was arbitrary, unreasonable, unfair, capricious, and farcical. About one and one-half hours of the time of said session was allotted by said City Council to said applicant John D. Gregg, and barely twenty minutes were allowed to the opponents of said application including these plaintiffs, and the representatives of said City Board of Education and said City Playground Commission, who were present and desired to express, and support, their protests against said application, and no time was allowed said protestants for rebuttal.

That the attitude, conduct, and votes of said eleven members of said City Council, are inexplicable upon any rational ground, and then were, and now are, utterly repugnant to the concept and objectives of said zoning plan, and subversive of the public welfare, health, and safety, and of the property rights of the land owners and residents within said "Community" area, including these [130] named plaintiffs, and all other similarly situated on whose behalf this action is also begun and is maintained.

XX.

That there did not exist at the time when said application was made, or at any time thereafter,

and there does not now exist, any necessity either public or private, for the commercial production of rock, sand, or gravel, from, or upon any of the lands which comprise said "Critical" area, and such a use of said property is not, and never has been, essential or desirable to the public convenience or welfare, or in harmony with the various elements or objectives of the Master Plan of Zoning as adopted and declared by said defendant city, as aforesaid.

That there is now, and continuously for many years immediately last past there has been, an adequate, available, quantity of commercial rock, sand, and gravel, in the natural deposits of said materials in the areas in Los Angeles County, wherein the commercial production of said materials is reasonably permissible, and is economically feasible, to supply all of the needs and demands for said materials, of a quality reasonably comparable to the quality of such materials that could be produced from the lands in said "Critical" area.

That a permanent prohibition of any operation for the commercial production of rock, sand, and gravel, from or upon said lands which comprise said critical area, would not create any material shortage in the available quantity of any of said materials in any market available for said materials, and would not tend to deprive any potential consumer of such materials, either public or private, of a supply of such materials adequate to satisfy his needs as and when they arise, and would not tend, in any manner, to affect prejudicially the public welfare, health, or safety.

That there were at the time when said application was made, at all times since has been, and now are, substantial stockpiles of [131] said processed materials at the processing plants in said San Fernando Valley, for which there has not been, and is not now, any market demand for either public or private use, and that said materials, in quality, are equal to, or better, than the materials which could be produced from or upon said "Critical" area, and said materials were and are available upon demand at prices reasonably comparable to the prices which could be reasonably obtained for the materials which could be produced from or upon said "Critical" area.

XXI.

That within a few days, to wit, on or about October 10, 1946, after the granting of said variance permit by said City Council, as aforesaid, these named plaintiffs caused to be served upon said defendants, a notice in writing that an action would be begun against said defendants in the above entitled court, as quickly as an appropriate complaint could be reasonably prepared, wherein these plaintiffs would seek to permanently enjoin said defendant city from permitting, and said defendant John D. Gregg from engaging in, any operation for the commercial production of rock, sand, and gravel within, or upon any of the lands within said "Critical" area.

XXII.

That said defendant John D. Gregg threatens to, and probably will, unless restrained by an exercise of judicial authority, immediately begin to excavate the land which comprises said "Critical" area, for the commercial production of rock, sand, and gravel.

That for said purpose, said John D. Gregg threatens to, and will if permitted so to do, excavate said "Critical" area to a depth of one hundred and fifty feet, or more, with a sidewall slope of not more than one horizontal foot to each vertical foot of depth, and which sidewalls at surface will extend to fifty feet, or less, from the property lines and existing streets which now bound said "Critical" area. That such an extraction of said materials from said land, would create a permanent void upon said land, because there is not, and [132] cannot be, any reasonable, economical, or practicable, means available for filling such a void upon said land.

That the structure and placement of the materials which compose said lands to said depth, are such that it is a reasonable probability and expectancy that in the course of time, by natural processes of erosion, the sidewalls of such a pit, at their upper surface, would recede until a slope of not less than one and one-half feet horizontally for each vertical foot of depth had been attained. That, for the reasons herein stated, it is a reasonable probability and expectancy, that a pit excavated upon said lands fifty feet distant from the property lines and public streets which now bound said lands, to a depth of

one hundred feet upon a slope of one horizontal foot to each vertical foot of depth, would substantially encroach, in the course of time, upon said public streets, and upon the lands which now bound said "Critical" area, and upon the lands abutting upon streets opposite the lands which comprise said "Critical" area.

XXIII.

That within and across said "Community" area, almost daily, the wind blows with a moderately strong intensity from southwest to northeast, and from northeast to southwest, and frequently within and across said "Community" area, vagrant winds of equal intensity blow in different and varying directions, and annually in the spring and fall, a wind of great intensity blows with moderate frequency, within and across said "Community" area in varying directions. It is a reasonable expectancy that the influence of natural laws which control and direct the vagaries of said winds, will persist permanently.

XXIV.

That any operation in the excavation of rock, sand, and gravel, on a commercial scale, within or upon said "Critical" area, would frequently, almost daily, pollute the air with dust and dirt, and that said dust and dirt in substantial and obnoxious quantities would be carried by said winds to the properties, respectively, of [133] these plaintiffs, and of others within said "Community" area,

similarly situated, and would be deposited upon said properties, and in the homes, and upon the persons, of these plaintiffs, and of others similarly situated.

That such a pollution of the air, and deposits of dust and dirt upon the properties and persons, and within the homes, of these plaintiffs, and of others similarly situated, is a natural and necessary consequence of any excavation within and upon said lands for the commercial production of rock, sand, and gravel, and such occurrences would constitute a dangerous, obnoxious, and deleterious condition, upon the premises of these plaintiffs and of others similarly situated, and upon the highways, and in places of public gatherings, within and throughout said "Community" area, and would substantially deprive these plaintiffs, and all others similarly situated, of their right to enjoy, and of their enjoyment, of their properties and homes, and of said highways, and of said places of public assembly, within said "Community" area.

XXV.

That any operation in the excavation of rock, sand, and gravel, on a commercial scale, within or upon said "Critical" area, would, as a natural and necessary consequence thereof, produce loud, rasping, grinding, and obnoxious noises. That said noises would penetrate to the properties and homes of these plaintiffs, and of others similarly situated, within said "Community" area, and would substantially and materially disturb these plaintiffs,

and said other persons, in their respective use and enjoyment of their properties and homes, and would substantially and materially impair and diminish their enjoyment, resepctively, of their properties and homes, and of the highways and places of public assembly, within said "Community" area.

XXVI.

That any operation for the commercial production of rock, [134] sand, and gravel, within or upon said "Critical" area, would, as a natural consequence thereof, substantially depreciate the intrinsic value and the market value of all of the lands whether in public or in private ownership, within said "Community" area, outside of said "Critical" area, and if persisted in until a substantial portion of said "Critical" area had been excavated to a depth of about fifty feet or more, such operations would practically destroy the intrinsic value, and the market value, of said lands.

XXVII.

That the named plaintiff West Coast Winery, Inc., is a corporation regularly organized and existing as such, and ever since the year 1924, it has been, and now is, the owner and in possession of that certain five-acre parcel of land marked "A" upon said map, and which is surrounded by said "Critical" area. That Peoria Street, upon which said premises abut to the westerly thereof is a public highway forty feet wide.

That said premises were improved in 1928, with substantial residential facilities, and said residential facilities ever since have been, and now are, used for residential purposes, and continuously for more than two years immediately last past have been, and now are, occupied and used by five persons for residential purposes.

That in 1933 said plaintiff further improved said premises by the construction of a reinforced concrete building, and underground storage facilities, for the conduct of a retail winery business upon said premises. That it would reasonably cost $250,000 to presently reproduce said improvements. That all of said improvements were completed more than five years ago and ever since their completion said facilities have been, and now are, in use in the conduct of said business.

That said nine named plaintiffs Archie I. Way, G. T. Winkler, Donald Kersey, Charles Wise, William Franklin Borrowe, Frank E. Wright, B. R. Frondren, Robert D. Hopkins, and R. E. Bertell, are, and were when said application was first made by said John D. Gregg for said variance permit, as herein alleged, the owners, respectively, and in possession, of those certain twelve parcels of real property which abut upon Wicks Street, on the westerly side thereof, southerly from said "Community Park," and which face said "Critical" area, and which parcels are numbered, respectively, as 11, 12, 13, 14, 15, 17, 19, 20, 21, 23, 24, and 25, upon said map. That said nine named persons continuously, were such owners and in possession of said proper-

ties, respectively, during the entire period following these dates, respectively, March 1946, as to said Archie I. Way; 1931, as to said G. T. Winkler; August 1945, as to said Donald Kersey; 1928, as to said Charles Wise; April 1945, as to said William Franklin Borrowe; April 1940, as to said Frank E. Wright; February 1946, as to said B. R. Fondren; January 1946, as to said Robert D. Hopkins, and 1929, as to said R. E. Bertell. That during said periods, respectively, said twelve properties were, and now are, improved, and occupied and used by said named plaintiffs, respectively, for residential uses and purposes, excepting that said plaintiff B. R. Fondren owns said parcels numbered 19, 20, and 21, and personally occupies said parcel number 19, and leases to others said percels numbers 20 and 21, and said Robert D. Hopkins owns said parcels numbers 23 and 24, and occupies said property numbered 23, and leases to others said property numbered 24.

That said three named plaintiffs, Dwight Moore, T. O. Easley, and Betsy Ross, are, and were when said application by said John D. Gregg, was first made as herein alleged, the owners, respectively, and in possession of those certain three parcels of real property which abut upon Wicks Street, on the easterly side thereof, southerly from that portion of said "Critical" area which abuts upon the easterly side of said Wicks Street, and which parcels are numbered, respectively, as 16, 18, and 26, on said map.

That said three named persons, continuously, were such [136] owners and in possession of said proper-

ties, respectively, during the entire periods following these dates respectively, November, 1944, as to said Dwight Moore; February 1946, as to said T. O. Easley, and 1925, as to said Betsy Ross. That during said periods, respectively, said three properties were, and now are improved, occupied, and used, by said three named plaintiffs, respectively, for residential uses and purposes.

That said four named plaintiffs, Frank J. Smythe, Helen Churchward, Louise R. Taylor, and Frank Lutizetti, are, and were when said application was made by said John D. Gregg, as aforesaid, the owners, respectively, and in possession, of those certain four parcels of real property which lie between said "Critical" area and Glenoaks Boulevard easterly of said parcels numbered 22 and 26 on said map, and which four parcels are numbered, respectively, 27, 28, 29, and 30, upon said map.

That said four named plaintiffs, continuously, were such owners and in possession of said properties, respectively, during the entire periods following these dates, respectively, September 1945, as to said Frank J. Smythe; October 1945, as to said Helen Churchward; April 1943, as to said Louise R. Taylor, and February 1940, as to said Frank Lutizetti. That during said periods, respectively, said four properties were, and now are, improved, and occupied and used by said named plaintiffs, for residential uses and purposes.

That said named plaintiff, Patrick Adams, is, and for more than five years continuously last past has been, the owner and in possession of that certain

parcel of real property which lies southerly and easterly of said "Critical" area, and abuts upon Pendleton Street, on the westerly side thereof, and is numbered 31 on said map. That during said entire period said property has been, and now is, improved, and occupied and used, by said named plaintiff, for residential uses and purposes.

That said named plaintiff, Paul C. Brown, is, and continuously [137] since November 1945, has been, the owner and in possession of that certain parcel of real property which lies easterly and northerly of said "Critical" area, and abuts upon Pendleton Street, on the westerly side thereof, and is numbered 32 on said map. That during said period said property has been, and now is, improved and occupied and used by said Paul C. Brown, for residential uses and purposes.

That said named plaintiffs, D. H. Calley, and C. C. Campbell, are, and continuously last past since 1945, and February 1946, respectively, the owners, and in possession, of those certain two parcels of real property which lie immediately northerly of said "Critical" area, and between Peoria and Wicks Streets, and are numbered respectively, 6, and 10, upon said map. That during said periods said properties have been, and now are, improved, and occupied and used by said plaintiffs, respectively, for residential uses and purposes.

That said named plaintiff W. L. Calley is, and for more than one year continuously last past has been, the owner and in possession of that certain parcel of real property which lies immediately

northerly of said "Critical" area, and between Peoria and Wicks Streets, and is numbered 5 upon said map, and is using, and during said entire period has used said property for residential uses and purposes.

That said named plaintiffs, Lillian Lewis, W. R. Shadley, and George J. King, are, and continuously last past for the periods since 1938 as to said Lillian Lewis; December 1936, as to said W. R. Shadley, and June 1946 as to said George J. King, respectively, have been, respectively, the owners, and in possession of those certain three parcels of real property which lie northerly of said "Community Park," and abut upon Wicks Street, on the westerly side thereof, and are numbered, respectively, 7, 8, and 9, on said map. That during said periods, respectively, said properties have been, and now are, improved, and occupied and used by said named plaintiffs, respectively for residential uses and purposes. [138]

That said named plaintiff Jackson Earl Wheeler, is, and for more than five years continuously last past has been, in possession of that certain parcel of real property located at the northeast corner of Helen and Art Streets, northeasterly of said "Critical" area, and numbered 33 upon said map. That said real property is, and during said entire period has been, occupied and used by said Jackson Earl Wheeler for residential uses and purposes.

That said property which comprises fifteen acres, and which abuts upon Wicks Street on the westerly said of said street, and immediately across said

street from said "Critical" area, and which is marked "Community Park and Hall" upon said map, is, and since 1928, continuously has been, owned by the Park Department of said defendant city and under the management of the Playground Department of said defendant city. That said property and the facilities thereof are, and for more than one year immediately last past, were, patronized and used by not less than 100 and sometimes by 800 persons each day, and by not less than 1000 and sometimes by 2000 persons each week.

XXVIII.

That the Planning Commission; Park Department; Playground and Recreation Department, and Board of Education, of said defendant city, have actively, consistently, vigorously, and publicly, opposed each and every application for a variance permit to conduct operations for the commercial production of rock, sand, and gravel, within said "Community" area, and are now opposed to the conduct of such operations within or upon any lands lying within said "Community" area, either under said variance permit, or otherwise, upon the grounds, among others, that such operations would be substantially and seriously detrimental to the public welfare, health, and safety, and particularly to the health and safety of many hundreds of young children who attend the places of worship; assembly; recreation, and training, maintained within said area; would be injurious to the properties within said area which are publicly owned, main-

tained, and operated; would be [139] substantially and seriously injurious to a very large number of properties in said area, in private ownership; and would destroy a substantial residential community which has been builded during a period of nearly thirty years upon public and private assurances, as herein related, that said area would be maintained and protected against any encroachment of the business of commercially producing rock, sand and gravel.

That this action is begun, and will be maintained, upon behalf of said four agencies of said defendant city, although not named as plaintiffs herein, because in their ownership and operation of valuable properties within said "Community" area, and their attitude in respect of the preservation thereof, as herein set forth, the situation of said agencies is similar to the situation of these named plaintiffs in respect of their own properties, as herein set forth.

XXIX.

That resident within said "Community" area there are, and for more than five years immediately and continuously last past there has been, more than one thousand persons who are not named as plaintiffs herein, but who, in the enjoyment of their homes within said "Community" area, and in their health and safety, would be substantially, materially, and injuriously affected in kind substantially as would be these named plaintiffs, but in varying de-

gress of lesser frequency and intensity, from any operation for the commercial production of rock, sand, and gravel, within or upon said "Critical" area, excepting that none of the properties of said persons would be in any danger of any encroachment of any pit which might be excavated upon said "Critical" area. That said numerous persons vigorously protest any conduct of any such operation within said "Community" area, and for these reasons this action is also begun, and will be maintained, for their benefit.

That outside of said "Community" area, but adjacent thereto to the north, northwest, and southeast thereof, and within said "Map" [140] area, there exists, and continuously for more than five years immediately last past there has existed, a substantial residential development, and use of property, as indicated by the numerous black squares upon said map. That the inhabitants of said area number more than three thousand, and they will be substantially, materially, and injuriously, affected by said proposed operations of said John D. Gregg within and upon said "Critical" area, substantially identical in kind but with lesser frequency and intensity, as these named plaintiffs, in the security of their persons, and in the enjoyment of their homes excepting that none of the properties of said inhabitants will be in danger from any encroachment of any pit which may be excavated upon said "Critical" area.

XXX.

That said "Community" area lies at an altitude of about one thousand feet, excepting that the extreme northerly and northeasterly areas thereof are fringed with low lying hills which rise in graceful contours from the plane of said "Community" area to varying elevations which at maximum are about five hundred feet higher than the elevation of the plane of said area. That said low lying hills, for more than one year continuously preceding said grant of said variance permit, were under extensive development for the subdivision, improvement, and use, thereof, for residential uses and purposes.

That within said "Community" area, two major paved public highways, namely, Glenoaks Boulevard and Sunland Boulevard, conjoin and provide a practical, feasible, and economical, means for motor transport north, south, east, and west, to the centers of industrial and commercial activities throughout the metropolitan Los Angeles area, wherein the residents of said "Community" area may obtain profitable employment.

That continuously for more than one year immediately preceding the public announcement of said grant of said variance permit, [141] there was a heavy and continuing demand for residential lots within said "Critical" area, for residential, improvement and use.

That said American Legion Hall located on Sunland Boulevard as shown upon said map, is, and for more than two years continuously last past has been, owned, occupied, and used, by American

Legion Post Number 520. That said American Legion Post has, and had during said period, a membership of one hundred and twenty-five members. That immediately, to wit, on October 3, 1946, upon being informed that on the preceding day said City Council had granted said variance permit, said American Legion Post, by its letter addressed to Honorable Fletcher Bowron, as the Mayor of said defendant City, vigorously protested the grant of said variance permit as subversive of the general public welfare, health, and safety, and as particularly destructive of the welfare, health, and safety, of the inhabitants of said "Community" area. That said protest is, and ever since its making, as aforesaid, has been, a true reflection of the attitude of said American Legionnaires in respect of said variance permit.

That none of the areas of land owned, occupied, or used, by the named plaintiffs, respectively, or of those other persons similarly situated, and on whose behalf this action is also begun and will be maintained, as aforesaid, is sufficiently large to support, or justify, any commercially economical, feasible, or practical, development or use for the commercial culture of horticultural or agricultural products.

XXXI.

That each of said named plaintiffs, and of those numerous other owners who reside upon their properties, within said "Community" area, respectively, acquired his and their said premises, with the knowledge that said "Community" area had been

restricted, as herein set forth, against any extension therein of any operation for the commercial production of rock, sand, and gravel, and in the belief, and in reliance thereupon, that said "Community" area would be [142] developed, improved, and used, as a predominantly residential area, immune, and to remain immune, to any encroachment therein, or thereupon, of any operation for the commercial production of rock, sand, and gravel, substantially in accordance with a general policy for such improvement, development, and use, and for such restriction, in conformity with a master plan of governmental zoning substantially as established and maintained by said defendant city continuously for more than thirty years prior to October 2, 1946, as herein set forth.

That excepting for such knowledge, belief, and reliance, said named plaintiffs would not have made their investments, respectively, in the acquisition, improvement, and use, of their said properties, as aforesaid.

That at the time when said defendant John D. Gregg acquired the lands which comprise said "Critical" area, as aforesaid, said defendants knew, and the facts were, that said named plaintiffs had acquired, improved, and used, and were, using their said premises, respectively, for residential purposes, as aforesaid, and that said defendant city, and said land company in which said defendant John D. Gregg, was, and is, president and a substantial owner, as aforesaid, had actively encouraged said named plaintiffs so to do, by their conduct as herein set forth.

XXXII.

That the lands lying within, and which constitute, said "Critical" area, are substantially the same in the structure and placement of the materials of which they are composed, and in their top soil condition, and in their surface contour, as the lands of these named plaintiffs, and of all other similarly situated, for whose benefit this action is begun and maintained.

XXXIII.

That said defendant John D. Gregg, threatens to, and will unless restrained by the order or judgment of the Court herein, enter upon said lands within said "Critical" area, and excavate thereon, or [143] therein, for the commercial production of rock, sand and gravel.

That in excavation of said threat said John D. Gregg, since the grant of said variance permit on October 2, 1946, and notwithstanding the notice served upon him on behalf of these plaintiffs, as aforesaid, has made an extensive excavation upon his own land lying immediately southerly of Glenoaks Boulevard, as hereinbefore alleged, and, in extension thereof, has excavated extensively upon and beneath said Glenoaks Boulevard, opposite and up to said "Critical" area, and has installed within said excavations a large metal pipe within which he proposes to operate the belt conveyor by which he proposes to convey the materials which he

threatens to excavate and primarily crush upon or within said "Critical" area, under said variance permit, to the processing plant which he maintains and operates upon the property which he owns southerly from said "Critical" area, and from said Glenoaks Boulevard, as aforesaid.

That the "primary crusher" referred to in condition number 2 in the statement of the conditions upon which said variance permit was granted, as set forth in paragraph XVIII hereof, and which "primary crusher" said John D. Gregg threatens to use, and must and will use, in any operation for the commercial production of rock, sand and gravel, under said variance permit, within or upon the lands which comprise said "Critical" area, is a powerful crushing mechanism constructed of metal which is necessarily and customarily used in such an operation, for the purpose of crushing into many smaller units at the place of excavation, the numerous boulders encountered in such excavation, which, in size and weight, are too large and heavy, without such crushing, for economical, feasible, and practical, transportation from the place of their occurrence to the processing plant of the operator.

That such crushing operations will produce loud, crunching, rasping, and obnoxious noises, and substantial quantities of dust and dirt, which will be carried by the winds within said "Community" area, to the homes of the inhabitants of said "Community" area, and to the [144] school, churches, and other places of public and private assembly within said "Community" area, as herein alleged.

and will substantially and materially interfere with, interrupt, and impair, the comfortable enjoyment of their homes and of said other places of assembly, within said "Community" area, by the inhabitants thereof.

That a substantial part of said offensive dust and dirt will consist of a granular silica in powdery form, which, upon being inhaled by the inhabitants of said area, and particularly by children of tender years, is conducive to the development and aggravation of tuberculosis and other respiratory and pulmonary afflications.

That a "screen planting" upon the margins of said "Critical" area, as required conditionally within said variance permit, would be a sham and a farce. It would not prevent, it would invite, the exploration of the tangled growth upon the brink of the deep and dangerous pit by innumerable children of tender years who reside within said "Community" area, or, otherwise, who visit the many places of worship, recreation, training, and public assembly, provided within said "Community" area, and by its tendency to conceal the grave dangers, otherwise obvious, and unavoidably incident to the maintenance of such a pit in such a community, said "screen planting" would substantially contribute to the gruesome sacrifice of children dead and injured, which the present and future generations would be required to make to such a misconceived public necessity, as the records of the Coroner's office of this county verify, as herein alleged.

XXXIV.

That said conduct of said defendant city in the purported exercise of its police power in respect of the zoning of said "community" area, is oppressive and discriminatory wherein under and by its said conduct of October 2, 1946, it granted unto said defendant John D. Gregg said variance permit, which was and is a special right and privilege not given, but denied, to all other owners of real [145] property situated in said "Community" area. That said act by said defendant city, was and is in excess of the just limits of its police power, is in violation of Article 1, Section 21, of the Constitution of the State of California, and of the Constitution of the United States of America, and is void.

XXXV.

That said conduct of said defendant city in the purported exercise of its police power in respect of the zoning of said "Community" area, wherein it granted said variance permit to said defendant John D. Gregg, constitutes a taking of the properties of these named plaintiffs, and of all others similarly situated within said "Community" area, without any public necessity therefor, and without just compensation to said persons, or to any of them, in violation of the constitutions, respectively, of the State of California, and of the United States of America, and is void.

XXXVI.

That said conduct of said defendant city, in the purported exercise of its police power, as aforesaid, wherein it granted said variance permit to said defendant John D. Gregg, is, and was, an unjust, oppressive, and arbitrary, exercise of its police power, and is an unwarranted invasion and confiscation of the properties, and property rights, of these named plaintiffs, and of all others similarly situated within said "Community" area, and is void.

XXXVII.

That the conduct of said defendant city, in the purported exercise of its police power, as aforesaid, wherein it granted said variance permit to said defendant John D. Gregg, bears no relation to the ends for which the police power exists, but is a clear and deliberate invasion under the guise of the police power, of the personal and property rights of these named plaintiffs, and of all others similarly situated within said "Community" area, for whose benefit this action is begun and maintained, and is void. [146]

XXXVIII.

That the real purpose of the eleven members of the City Council of said defendant city, who voted for the grant of said variance permit, and by whose votes said permit was granted, was not to protect the public welfare, health, or safety, or to promote any objective of any just or permissible exercise of

the police power of said defendant city, but was for the purpose of preferring said John D. Gregg as against all other property owners within said "Community" area, in the use and enjoyment of their properties within said area, respectively, and to enable said John D. Gregg to vastly expand his operations of producing rock, sand, and gravel, commercially, by the use of his facilities therefor, now maintained by him upon a tract of land comprising about sixty-two and one-half acres, situated within said M-3 zone adjoining said "Community" area to the south, as aforesaid, and of which land only about 35 acres have been excavated, without the necessity or expense of removing his said facilities to a different location in order to expand his ownership of lands upon which, by the use of said processing facilities, he could engage in the commercial production of rock, sand, and gravel.

That the strict and literal interpretation and enforcement of the provisions of said zoning laws as to the lands within said "Community" area, including the lands which comprise said "Critical" area, would not produce, or accentuate, any practical difficulties, unnecessary hardships, or results inconsistent with the general purposes of said zoning laws, in relation to said defendant John D. Gregg, or otherwise.

That plaintiffs are informed and believe, and therefore allege, that said defendant John D. Gregg, is, and for more than five months continuously last past, has been the owner, or in control of, more than one hundred and forty acres of unexcavated land

situated within the San Fernando Valley within the corporate limits of said defendant city, which lands are as well, or are better adapted to [147] the commercial production of rock, sand, and gravel, than are the lands which comprise said "Critical" area, and upon which the conduct of such operations is permissible, and upon which such operations could be conducted by him, economically, feasibly, and practically.

XXXIX.

That if operations for the commercial production of rock, sand, and gravel, are extended to, and conducted within, or upon any of the lands lying within said "Critical" area, and within the provisions of, said variance permit, the enjoyment by these named plaintiffs and of others similarly situated in said "Community" area, of their said homes and properties within said "Community" area, will be substantially, materially, and seriously, disturbed, interfered with, interrupted, and diminished, immediately, and that the injuries and damage arising therefrom will progressively expand as such operations are extended upon, or within, said "Critical" area, and that by reason thereof these plaintiffs, and all other persons similarly situated within said area, would be substantially and irreparably damaged.

XL.

That if operations for the commercial production of rock, sand, and gravel, are extended to, and conducted within or upon the lands lying within said

"Critical" area, under and within the provisions of said variance permit, the actual value, and the reasonable market value, of the properties, respectively, of these named plaintiffs and of all others similarly situated with said "Community" area, located within said "Community" area, as herein described, will be immediately, substantially, and materially, depreciated, and progressively, as such operations continue, will be substantially destroyed, and that thereby these named plaintiffs and all others similarly situated within said "Community" area, will be irreparably [148] and permanently damaged.

XLI.

That said defendant John D. Gregg, by his conduct as herein set forth, is estopped to claim or exercise any right, privilege, or benefit, under said variance permit, or to conduct any operations within or upon the lands which comprise said "Critical" area, for the commercial production of rock, sand, or gravel.

XLII.

That said defendant city by its conduct, as herein set forth, is estopped to grant said variance permit, or to permit said John D. Gregg to exercise or enjoy any benefit, right, or privilege, under said variance permit, or to authorize or permit any extension of any operation for the commercial production of rock, sand, or gravel, into said "Community" area, or within or upon any of the lands located within said "Community" area, or within said "Critical" area.

XLIII.

That in the circumstances herein alleged, right and justice demand that in order to prevent manifest wrong and injustice to the innumerable persons, organizations, and public agencies, for whose benefit this action is begun and maintained, as herein set forth, said defendant city be permanently enjoined from authorizing, or permitting, said John D. Gregg, or anyone, to conduct any operation for the commercial production of rock, sand, or gravel, within or upon any lands located within said "Community" area, and that said grant of a variance permit to said John D. Gregg to conduct such operations within said area be declared void as an act in excess of any reasonable exercise of the police power of said defendant city, and that said defendant John D. Gregg be permanently enjoined from exercising any right or privilege which derives from said purported grant of a variance permit.

XLIV.

That said John D. Gregg does not reside, and never has [149] resided, within said "Community" area, and all of his revealed thought, activities, and energy, have been, and are being, expended toward the destruction of said community, and not at all toward the preservation and upbuilding of said community.

That by reason of the conduct of said defendant John D. Gregg, as aforesaid, the occupancy by these named plaintiffs, of their homes, respectively, has been, and is, rendered substantially and materially uncomfortable, and their enjoyment of their

homes and properties, respectively, has been, and is, substantially, materially, and grievously, interferred with and impaired, and that by reason thereof these named plaintiffs have been damaged in the sum presently undeterminable, but in excess of one hundred thousand dollars, and that said injury and damage is a continuing tangible injury and damage, and that a monetary evaluation thereof is materially higher each ensuing day. That no part of said damages has been paid, or in any manner satisfied, and the whole thereof is owing and unpaid.

XLV.

That said conduct of said defendant John D. Gregg, has been, and is, oppressive, fraudulent, and malicious, in respect of these named plaintiffs and of all others, similarly situated in said "Community" area, and this action, therefore, is a proper action in which to assess against said defendant John D. Gregg punitive damages for the sake of example, and by way of punishing said defendant for his said conduct, and that the sum of $250,000. is a reasonable sum to be assessed herein for said purposes.

XLVI.

That plaintiffs do not have any plain, adequate, or speedy action of law.

Wherefore, plaintiffs pray that:

(1) the action of said defendant City in granting said variance permit, and said variance permit, be declared void, and of [150] no force, virtue, or effect, in law or in equity;

(2) that said defendant City be enjoined from granting or undertaking to grant, any variance permit under existing zoning laws, for the conduct of and from permitting any operation upon or within any lands situated within said "Community" area, for the commercial production of rock, sand, and gravel;

(3) that said John D. Gregg be enjoined from exercising any right, benefit, or privilege, under said variance permit, and from conducting any operation for the commercial production of rock, sand, and gravel, within, or upon, any of the lands situated within said "Critical" area, or within said "Community" area;

(4) that each of said defendants be preliminarily restrained from doing anything as to which their permanent restraint is herein sought;

(5) that plaintiffs have and recover from said defendant John D. Gregg, their actual damages accrued up to the date of judgment herein, as the same may be determined upon the trial hereof;

(6) that plaintiffs do have and recover of said defendant John D. Gregg, punitive damages in the sum of $250,000, for the sake of example, and by way of punishing said defendant for his conduct as herein alleged, and

(7) that plaintiffs have such other and further relief as to the court shall seem equitable, and for costs of suit.

/s/ OLIVER O. CLARK,
/s/ ROBERT A. SMITH,
Attorneys for Plaintiffs.

State of California,
County of Los Angeles—ss.

Jackson Earl Wheeler being by me first duly sworn, deposes and says: That he is one of the plaintiffs in the above entitled action; that he has read the foregoing Complaint in Equity for Injunction and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ JACKSON EARL WHEELER.

Subscribed and sworn to before me this 22nd day of November, 1946.

/s/ ROBERT A. SMITH,
Notary Public in and for said County and State.
My Commission Expires Sept. 23, 1948.

[Endorsed]: Filed Nov. 22, 1946. [152]

In the Superior Court of the State of California,
in and for the County of Los Angeles

No. 522031

JACKSON EARL WHEELER, et al.,

Plaintiffs,

vs.

J. D. GREGG, et al.,

Defendants.

Holbrook & Tarr and Clyde P. Harrell, Jr., 740 Rowan Bldg., Los Angeles 13, Calif. MI 2191; and Donald J. Dunne, 215 W. 7th St., Los Angeles, Cal. (TR. 7036), Attorneys for defendant John D. Gregg.

ANSWER OF THE DEFENDANT J. D. GREGG

Defendant J. D. Gregg, for himself alone, answers plaintiffs' complaint on file herein as follows:

I.

This defendant admits the allegations contained in paragraphs I and XXI of plaintiffs' complaint.

II.

This defendant denies, both generally and specifically, each and every allegation contained in paragraphs III, IV, X, XI, XIV, XVI, XX, XXIV, XXV, XXVI, XXVII, XXVIII, XXIX XXXI, XXXII, XXXIV, XXXV, XXXVI, XXXVII, XXXVIII, XXXIX, XL, XLI, XLII, XLIII, XLIV, XLV and XLVI of plaintiffs' complaint.

III.

Answering paragraph II of plaintiffs' complaint, this defendant admits that during the year 1934 he began, and subsequent thereto [154] accomplished, the excavation of rock, sand and gravel on a tract of land of approximately 62 acres owned by him, which said land lies in M-3 Zone and is distant about 300 feet southerly from Glenoaks Boulevard. This defendant further admits that he maintains upon said land machinery and equipment and other facilities for the excavation of rock, sand and gravel, and for the processing of the same for market.

Further answering said paragraph II of plaintiffs' complaint, this defendant alleges that he has not sufficient information or belief to enable him to answer any of the other allegations contained in said paragraph, and basing his denial on the lack of such information or belief denies, both generally and specifically, each and every allegation contained in said paragraph not expressly admitted in this answering paragraph.

IV.

Answering paragraph V of plaintiffs' complaint, this defendant admits that on the 16th day of February, 1916, the City of Los Angeles enacted Ordinance No. 33,761, and that said ordinance remained in full force and effect until the same was re-enacted and superseded by the provisions of Ordinance No. 74,140, which ordinance became effective October 27, 1934. This defendant further admits that

on or about the 11th day of April, 1918, certain lands which comprise the area described as a map area on Exhibit A attached to plaintiffs' complaint were annexed to the City of Los Angeles.

But this defendant denies, both generally and specifically, each and every allegation contained in said paragraph V of plaintiffs' complaint not expressly admitted in this answering paragraph.

V.

Answering paragraph VII of plaintiffs' complaint, this defendant alleges that he has not sufficient information or belief to enable him to answer the allegations contained in paragraph VII of plaintiffs' [155] complaint, and basing his denial upon the lack of such information or belief denies, both generally and specifically, each and every allegation contained in said paragraph VII.

VI.

Answering paragraph VIII of plaintiffs' complaint, this defendant alleges that he has not sufficient information or belief to enable him to answer the allegations contained in paragraph VIII of plaintiffs' complaint, and basing his denial upon the lack of such information or belief denies, both generally and specifically, each and every allegation contained in said paragraph VIII.

VII.

Answering paragraph IX of plaintiffs' complaint, this defendant admits that during the years 1945

and 1946 the defendant City of Los Angeles made an extensive re-survey and study of its master plan of zoning within its municipal boundaries, including the area lying in what is commonly known and referred to as the San Fernando Valley, and on March 7, 1946, enacted Ordinance No. 90,500, which said ordinance became effective on June 1, 1946. But this defendant denies each and every allegation contained in said paragraph IX not expressly admitted in this answering paragraph; and alleges that said Ordinance No. 90500 among other things, amended Article 2 of Chapter 1, of the Los Angeles Municipal Code; that it is provided by the provisions of Section 12.24 of the Los Angeles Municipal Code, in part, as follows:

"A. Location of Permitted Uses—Wherever it is stated in this Article that the following uses may be permitted in a zone if their location is first approved by the Commission, said uses are deemed to be a part of the development of the Master Plan or its objectives and shall conform thereto. Before the Commission makes its final determination a public hearing by the Commission shall be mandatory for certain uses and optional for others: [156]

"1. Uses for which at least one public hearing shall be held include: airports or aircraft landing fiields; cemeteries; educational institutions; and golf courses (except driving tees or ranges, miniature courses and similar uses operated for commercial purposes).

"2. Uses for which a public hearing is optional include: churches (except rescue mission

or temporary revival); schools, elementary and high; and public utilities and public service uses or structures.

"B. Additional Uses Permitted—The Commission, after public hearing, may permit the following uses in zones from which they are prohibited by this Article where such uses are deemed essential or desirable to the public convenience or welfare, and are in harmony with the various elements or objectives of the Master Plan:

"1. Airports or aircraft landing fields.

"2. Cemeteries.

"3. Development of natural resources (excluding the drilling for or producing of oil, gas or other hydrocarbon substances) together with the necessary buildings, apparatus or appurtenances incident thereto.

"4. Educational institutions.

"5. Governmental enterprises (federal, state and local).

"6. Libraries or museums, public.

"7. Public utilities and public service uses or structures. * * *

"C. Procedure—Written applications for the approval of the uses referred to in this Section shall be filed in the public office of the Department of City Planning upon [157] forms prescribed for that purpose by the Commission.

"The procedure for holding public hearings shall be the same as that required in Sec. 12.32-C.

"The Commission shall make its findings and determination in writing within forty (40) days from the date of filing of an application and shall forthwith transmit a copy thereof to the applicant. No decision of the Commission under this Section shall become effective until after an elapsed period of ten (10) days from the date the written determination is made, during which time the applicant, or any other person aggrieved, may appeal therefrom to the City Council in the same manner as provided for in Sec. 12.32-E.

"In approving the uses referred to in this Section, the Commission shall have authority to impose such conditions as are deemed necessary to protect the best interests of the surrounding property or neighborhood and the Master Plan."

VIII.

Answering paragraph XII of plaintiffs' complaint, this defendant admits that in the year 1941 he became President of the Los Angeles Land and Water Company and is the owner of an interest in said Company. But this defendant denies, both generally and specifically, each and every allegation contained in paragraph XII of plaintiffs' complaint not expressly admitted in this answering paragraph.

IX.

Answering paragraph XIII of plaintiffs' complaint, this defendant admits that within five years last past he has acquired by purchase several separate parcels of land located within the area de-

scribed by plaintiff as a "critical" area; but this defendant denies, both generally and specifically, each and every allegation contained in said paragraph [158] XIII not expressly admitted in this answering paragraph.

X.

Answering paragraph XV of plaintiffs' complaint, this defendant admits that on June 2, 1946, he filed an application with the Planning Commission of the City of Los Angeles, requesting that the said Planning Commission grant to him "a conditional use permit" authorizing him to use the property described in paragraph I of plaintiffs' complaint for the purpose of mining rock, sand and gravel on said real property. This defendant admits that in support of said application he represented to the defendant City of Los Angeles that the real property last above referred to was composed of gravel beds and was primarily suitable only for the production of rock, sand and gravel, and that the use to which this defendant proposed to put said real property was in harmony with the various elements and objectives of the master plan of zoning as enacted by the defendant City. This defendant further admits that he represented to the City of Los Angeles in support of said application that there were about 310 acres of rock-bearing land in M-3 Zone in the San Ferdnando Valley, and that approximately only 23,000,000 tons were available to existing plant facilities and that such tonnage was not sufficient to meet the demands of the market

of the City of Los Angeles for any reasonable period of time. This defendant further admits that he represented to the defendant City of Los Angeles in support of said application for a conditional use permit that the real property described in paragraph I of plaintiffs' complaint was not desirable and was unsuitable for residential purposes but this defendant denies, both generally and specifically, each and every allegation contained in said paragraph XV not expressly admitted in this answering paragraph.

XI.

Answering paragraph XVII of plaintiffs' complaint, this defendant denies, both generally and specifically, each and every allegation [159] contained in said paragraph XVII; and alleges that after a public hearing held by the City Planning Commission on June 20, 1946, on July 25, 1946, said Commission, by unanimous vote of its members present, denied defendant's application for a conditional use permit and rendered its decision in writing; that a copy of said decision is attached hereto marked Exhibit "A," and the same is hereby referred to and by such reference made a part hereof.

XII.

Answering paragraph XVIII of plaintiffs' complaint, this defendant admits the allegations contained in said paragraph, and alleges that at the time the City Council of the City of Los Angeles granted the application of this defendant said City Council made certain findings, which said findings

are included in the minutes of its meeting held October 2, 1946. A true and correct copy of said minutes are attached hereto marked Exhibit "B," and the same is hereby referred to and by such reference made a part hereof.

XIII.

Answering paragraph XIX of plaintiffs' complaint, this defendant admits that the granting of said application was accomplished by the affirmative vote of eleven members of the City Council, who, within eight months immediately preceding said grant, had voted for the adoption of Zone Ordinance No. 90,500 on March 7, 1946. But this defendant denies, both generally and specifically, each and every allegation contained in said paragraph XIX not expressly admitted in this answering paragraph.

XIV.

Answering paragraph XXIII of plaintiffs' complaint, this defendant alleges that he has not sufficient information or belief to enable him to answer the allegations contained in paragraph XXIII of plaintiffs' complaint, and basing his denial upon the lack of such information or belief denies each and every allegation contained in said paragraph.

XV.

Answering paragraph XXX of plaintiffs' complaint, this defendant admits that there is an American Legion Hall located on Sunland Boulevard, but this defendant alleges that he has not sufficient in-

formation or belief to enable him to answer any other of the allegations contained in said paragraph XXX, and basing his denial upon such lack of information or belief denies, both generally and specifically, each and every allegation contained in said paragraph XXX.

XVI.

Answering paragraph XXII and XXXIII of plaintiffs' complaint, this defendant admits that he will, unless restrained by order of court, enter on the lands described in paragraph I of plaintiffs' complaint, and described by plaintiff as a "critical" area, and excavate thereon for the commercial production of rock, sand and gravel. This defendant further admits that since the granting of said conditional use permit on October 2, 1946, he has made an excavation across Glenoaks Boulevard and has caused to be installed a large metal pipe within which he proposes to operate a conveyor belt to convey materials from the property described in paragraph I of plaintiffs' complaint, lying northerly of Glenoaks Boulevard and referred to by plaintiffs as a "critical" area, to the processing plant which he now maintains and operates on the property which he owns immediately southerly of said Glenoaks Boulevard.

This defendant further admits that he proposes to use a "primary crusher" on the lands described in paragraph I of plaintiffs' complaint and referred to by plaintiff as a "critical" area, and that such

"primary crusher" is a powerful crushing mechanism constructed of metal which is necessarily and customarily used in such operations for the purpose of crushing into many smaller units at the place of excavation numerous boulders encountered in such excavation which in size and weight are too large and heavy without such crushing for economical, feasible and practical transportation from the place of their occurrence to the processing plant of the operator. But this defendant denies, [161] both generally and specifically, each and every allegation contained in said paragraphs XXII and XXXIII not expressly admitted in this answering paragraph.

As a second, separate and affirmative defense, this defendant alleges as follows:

I.

That all of the lands described in paragraph I of plaintiffs' complaint are rock, sand and gravel deposits containing rock, sand and gravel materials of the highest quality. That said lands comprise a part of the Tujunga Wash and until the construction of Hanson Dam by the Los Angeles County Flood Control District in or about the year 1940 said lands were subject to inundation. That the deposit of first-grade rock, sand and gravel within said lands is approximately 100 feet in depth on the southerly end thereof and 50 to 60 feet in depth on the northerly end thereof. That rock, sand and gravel operations and excavations have been carried on in the vicinity of this area ever since the year 1908.

II.

That during the years 1945 and 1946 the City of Los Angeles conducted an extensive survey relating to the zoning of land within the corporate limits of the City of Los Angeles and after making said survey enacted Ordinance No. 90,500. Said ordinance went into effect on June 1, 1946. Said ordinance, among other things, amends Article 2, Chapter 1, of the Los Angeles Municipal Code and provides for the first comprehensive system of zoning ever enacted in the City of Los Angeles. Until the enactment of said ordinance no specific zoning covered any of the real property described in paragraph I of plaintiffs' complaint or referred to on Exhibit A attached to plaintiffs' complaint. That all of the land last-above described was subject to Ordinance No. 74,140, adopted by the City of Los Angeles October 27, 1934. That said Ordinance No. 74,140 was enacted for the purpose of [162] limiting the use of land for any purpose other than residential, unless and until said lands were included in a specific zoning plan covering said property or a variance from the provisions thereof was granted in accordance with the procedure prescribed thereby.

II.

By the provisions of Section 12.24 of the Los Angeles Municipal Code, as amended by Ordinance No. 90,500, it was provided that the City Planning Commission of the City of Los Angeles might

authorize the use of any lands within the City of Los Angeles for the purpose of the development of natural resources, and if such use was expressly authorized that the same should be deemed in accordance with the master plan. The applicable provisions of Section 12.24 of the Los Angeles Municipal Code are set forth in paragraph VII of this answer, and the same are hereby referred to and made a part of this second, separate and affirmative defense to the same extent as though the same were fully set forth at this point.

Pursuant to the procedure prescribed by said section, on June 2, 1946, this defendant filed an application with the City Planning Commission of the City of Los Angeles, requesting that he be granted a conditional use permit authorizing him to use the lands described in paragraph I of plaintiffs' complaint for the purpose of mining for rock, sand and gravel thereon. Thereafter, and after notice duly given, the City Planning Commission held a public hearing, at which time those opposing and those favoring the granting of the application were allowed in excess of our hour each to present their case. That on said date the Planning Commission took the matter under submission and on July 25, 1946, denied the application of this defendant.

III.

On August 1, 1946, this defendant, pursuant to the provisions of Subdivision C of Section 12.24 of the Los Angeles Municipal Code, filed his appeal

to the City Council. The City Council referred it to its duly constituted City Planning Committee, and on September 26, 1946, [163] after notice duly given, said City Planning Committee held a public hearing on the application, and thereafter made its findings and report to the City Council in the words and in the figures set forth in the minutes of the Council of the City of Los Angeles dated October 2, 1946, a copy of which said minutes are attached hereto and marked Exhibit "B," and on October 2, 1946, the City Council of the City of Los Angeles, by a vote of eleven of its members, adopted the report of its City Planning Committee and granted to this defendant its application for a conditional use permit, under the terms and conditions recited in the minutes of the City Council as of October 2, 1946.

IV.

That this defendant will conduct operations for the mining of rock, sand and gravel in strict accordance with the provisions and conditions of said permit.

V.

That the lands described in paragraph I of plaintiffs' complaint are located in a zone where mining for rock, sand and gravel is permitted, and was expressly authorized by the action of the City Council on October 2, 1946. That the use which defendant will make of this property is a com-

mercial use, and his operations will be only such as are reasonable and necessary for the operation of his business, and under the terms and conditions recited in the permit issued by the City Council on October 2, 1946. That such operations will not constitute a nuisance, and that he will not employ any unnecessary or injurious methods in said operations.

Wherefore, this defendant prays that plaintiffs take nothing by reason of this action; that the same be dismissed; that this defendant recover his costs of suit herein incurred, and such other and further relief as to the court may seem meet and just in the premises. [164]

HOLBROOK & TARR and
CLYDE P. HARRELL, JR.,
DONALD J. DUNNE,

By /s/ CLYDE P. HARRELL, JR.,
Attorneys for Defendant,
J. D. Gregg. [165]

EXHIBIT "A"

July 25, 1946.

City Plan Case 962

(Copy)

Mr. John M. Gregg
P. O. Box 110
Whittier, California

Re: Application for Conditional Use for the Excavation of Rock, Sand and Gravel on Wicks Street, Dronfield Avenue, Pendleton Street and Glenoaks Boulevard.

Dear Mr. Gregg:

The excellent arguments made by both applicant and protestants in this case have reduced the problem to the basic consideration of what use of the land in question best serves the public need.

After the fullest discussion, the City Planning Commission members are of the unanimous opinion:

1. That the highest and best use of the property in question is not that of excavating for gravel, sand and rock;

2. That, in view of reliable information to the effect that there are 451 acres of potential gravel beds in M-3 zoned land in the San Fernando Valley in which excavations have not yet been begun, there is at this time no

public necessity for extending the conditional use privilege under Section 12.24 of the Zoning Ordinance.

The granting of the request is therefore unanimously denied.

Very truly yours,

WM. H. SCHUCHARDT,
President. [166]

EXHIBIT "B"

Excerpt from Minutes of the Council of the City of Los Angeles Meeting held October 2, 1946. (Vol. 321, Pages 374-376, Inc. File No. 24473)

The Planning Committee reported as follows:

In the matter of communication from the City Planning Commission relative to appeal of John D. Gregg from the decision of said Commission in denying his application for conditional use for the excavation of rock, sand, and gravel on real property in the San Fernando Valley bounded generally by Wicks Street, Dronfield Avenue and its southerly extension, Pendleton Street and Glenoaks Boulevard, more particularly described in said application, as amended, of said communicant to the said Commission and known as City Plan Case No. 962.

In accordance with provisions of the zoning ordinance, your Committee conducted a public hearing on this matter whereat proponents and

opponents of the question were heard and although a considerable number of protests were filed, after careful consideration of all the facts presented and a study of same, it is our opinion that the said use should be permitted.

We therefore recommend in accordance with the requirements of the zoning ordinance that the Council make the following written findings of fact:

The Council finds that the findings of the City Planning Commission on which said Commission's decision was based denying this application were in error for the following reasons:

1. That the property involved is situated in a district, the character of which is unsuited for residential purposes.
2. That the land in question is composed of gravel beds and is primarily suitable only for production of sand, rock, and gravel. [167]
3. That the proposed use of this property is deemed essential to the public convenience and welfare and is in harmony with the various elements or objectives of the master plan.
4. That under the conditions to be imposed the proposed use would not be detrimental to surrounding developments and would not adversely affect individual property rights or interfere with the enjoyment of property rights of property owners in the vicinity or affect any legal right of such property owners.
5. While there are about 450 acres of rock bearing land in M-3 zones in the area only 23,000,000 tons are available to existing plant

facilities and this amount is not sufficient to meet public and private demand for rock aggregates.

We further find from the foregoing reasons that the public necessity, convenience, and general welfare require that this appeal be granted and the conditional use be permitted as requested subject to the following conditions:

1. That the applicant construct a 6-foot cyclone type mesh wire fence around the said property, including barbed wire on the top of said fence providing the Fire Department grants permission for same.
2. That no permanent plant building or structure be installed or maintained on said property and that all material excavated be mined by an electrically powered shovel and primary crusher and transported by a conveyor belt system running through a tunnel or tunnels under Glenoaks Boulevard to the plant now owned and operated by applicant, lying southwesterly of said Boulevard and processed at said plant.
3. That a setback line of fifty feet from all property lines and existing streets be maintained and that slopes of excavations be maintained at one foot to one foot.
4. That the area between all property lines or street line and 50 foot setback be screen planted progressively as excavations proceed.

We Further Recommend that permission be granted to said applicant to make such excavations

in Glenoaks Boulevard as may be necessary to install and house the necessary conveyor belts, such excavations to be made in accordance with specifications of and at the location approved by the Board of Public Works.

Mr. Rasmussen moved, seconded by Mr. Henry, that said report as read be adopted.

Mr. Warburton moved, seconded by Mr. Rasmussen, that twenty minutes be allotted to each side to present their case.

Which motion was adopted by a unanimous vote.

Thereupon Mr. John D. Gregg, appellant, addressed the Council and made a statement as to past operations of his company, and of the demand for rock and gravel at the present time.

Mr. Jackson Wheeler, home owner and representing other property owners, thereupon addressed the Council in opposition to granting the application.

Mr. Paul McMahon of the Board of Education, and Mr. George Hjelte of the Playground and Recreation Department, addressed the Council speaking in opposition to granting the permit owing to hazardous conditions that will be created.

Mr. Davies then moved, seconded by Mr. Warburton, that Mr. H. P. Cortelyou, Director of the Bureau of Maintenance and Sanitation, be requested to attend the Council session and speak upon the question.

Which motion was adopted by a unanimous vote.

While awaiting Mr. Cortelyou's attendance at the Council session, Mr. Henry moved, seconded by Mr. Rasmussen, that ten minutes be allotted to the appellant for rebuttal.

Which motion was adopted by a unanimous vote.

Whereupon Mr. Clyde Harrell, representing the appellant, and Mr. Robert Mitchell, President of the Consolidated Rock Products Company, again reiterated the necessity of granting the application.

Mr. Cortelyou then being present in the Council Chamber, addressed the Council stating that anything he might say was his own opinion as an individual and as Director of the Bureau of Maintenance and Sanitation and that he was not appearing in behalf of, or by authority of the Board of Public Works.

Mr. Cortelyou stated that if there is not a sufficient supply of aggregate in the San Fernando Valley available for use upon City work, it would be necessary to secure same from greater distances, which would necessarily increase the length of haul and undoubtedly increase the cost to the City.

Mr. Warburton then moved, seconded by Mr. Rasmussen, that further consideration of the matter be continued until the meeting of the Council to be held December 3, 1946, and in the meantime the City Engineer be instructed to make a survey of available supplies of rock and sand deposits in the San Fernando Valley and report thereon to the City Council.

Upon calling the roll the members voted as follows: Ayes—Messrs. Holland, Warburton and President Moore (3); Noes—Messrs. Austin, Bennett, Christensen, Cronk, Davenport, Davies, Harby, Henry, Rasmussen and Timberlake (10).

The President declared the motion to continue failed of adoption, and instructed the Clerk to call the roll on the adoption of the report of the Committee, and upon calling the roll the members voted as follows: Ayes—Messrs. Austin, Bennett, Cronk, Davenport, Davies, Harby, Henry, Holland, Rasmussen, Timberlake and President Moore (11); Noes—Messrs. Christensen and Warburton (2).

The President declared the committee report adopted.

State of California,
County of Los Angeles—ss.

J. D. Gregg, being first duly sworn, deposes and says: that he is one of the defendants in the entitled action; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ J. D. GREGG.

Subscribed and sworn to before me this 3rd day of January, 1947.

[Seal] /s/ STANLEY MATTHEWS,
Notary Public in and for the County of Los Angeles,
State of California.

Affidavit of Service by Mail—1013a, C. C. P.

State of California,
County of Los Angeles—ss.

Clyde P. Harrell, Jr., being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business/residence address is: 740 Rowan Bldg., Los Angeles 13, California; that on the 3rd day of January, 1947, affiant served the within Answer on the Attorneys for plaintiffs in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said plaintiffs at the residence/office address of said attorneys, as follows: Oliver C. Clark and Robert A. Smith, 818 Garfield Building, Los Angeles 14, Calif., and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Mail at Los Angeles, California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed or/and there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ CLYDE P. HARRELL, JR.

Subscribed and sworn to before me this 3rd day of January 1947.

[Seal] /s/ STANLEY MATTHEWS,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Jan. 3, 1947.

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 522031.

JACKSON EARL WHEELER, et al.,
Plaintiffs,

vs.

J. D. GREGG, et al.,
Defendants.

Holbrook & Tarr and Clyde P. Harrell, Jr., 740 Rowan Building, Los Angeles 13, Calif., Michigan 2191; and Donald J. Dunne, 215 W. 7th Street, Los Angeles 14, Calif., Trinity 7036; and Guy Richards Crump, 458 So. Spring St., Los Angeles 13, Calif., Trinity 4152, Attorneys for Defendant John D. Gregg.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial in Department 15 of the above entitled Court, before Honorable Alfred L. Bartlett, Judge Presiding, on the 28th day of May, 1947, and was tried by said Court, without a jury, a trial by jury having been expressly waived by all parties, plaintiffs appearing by their attorney, Oliver O. Clark, Esq., and defendant J. D. Gregg appearing by his attorneys, Guy Richards Crump, Esq., Clyde P. Harrell, Jr., Esq. and Donald J. Dunne, Esq., and defendant City of Los Angeles appearing by Ray L. Chesebro, Esq., City Attorney of the City of Los Angeles, and

Thomas H. Hearn, Esq., Deputy City Attorney, and evidence both oral and documentary having been introduced on the issues raised by the complaint and answer, and the cause having been fully argued before the Court, and having been submitted by the parties, and the Court being fully advised in the premises, now makes its Findings of Fact and Conclusions of Law, as follows:

Findings of Fact

I.

That it is true that the City of Los Angeles is a municipal corporation organized and existing under and by virtue of a municipal charter.

II.

That it is true that defendant J. D. Gregg is the owner or lessee and in possession of that certain real property comprising approximately 115 acres of land situated in the City of Los Angeles, County of Los Angeles, State of California, described as follows, to wit:

> Lots 1, 2, 4, 5, 6, 7, 13 and 14 in Block 19; the Easterly 150 ft. of Lot 12 in Block 8; Lots 4 to 9, inclusive, and Lots 15 to 19, inclusive, and Lots 21 and 22 and the Easterly 280 ft. of Lot 14 in Block 17; all of the Los Angeles Land & Water Co.'s Subdivision of a part of Maclay Rancho, as per Map recorded in Book 3 of Maps at Pages 17 and 18 in the office of the County Recorder of said County;

and that said land is colored in red and designated and referred to as the "Critical Area" upon that certain map marked Exhibit "A," which is attached to the complaint herein, and which land has also been referred to during the trial of this case as the "Permit Area."

III.

That it is true that said map marked Exhibit "A" and attached to said complaint is a substantially correct representation of the area covered thereby upon a scale of one inch to each 1,000 lineal feet thereof.

IV.

That it is true that the area enclosed on said map marked Exhibit "A" and attached to said complaint, by a red line [173] is not more than 3,000 feet from the various extremeties of the said "Critical" or "Permit" area, and that said area is referred to in said complaint as the "Community" area; but that it is untrue that said area so enclosed on said map by said red line is in fact a "Community" area or any other area other than an arbitrary designation by said plaintiffs of a portion of the general area shown on said map.

V.

That it is true that some of the narrow parallel lines designated as a street upon said map are and have been for more than five years last past dedicated as a public highway; but the Court finds that certain of said streets so designated upon said

map are unimproved and are not presently being used as a public highway; that it is true that certain of said streets are paved highways but that it is also true that other of said streets are unpaved.

VI.

That it is true that the area shaded in green on said map and designated as a "Community Park" contains approximately 15 acres of land and ever since 1928 has been a public park maintained by the Park Department under the management of the Playground Commission of the City of Los Angeles; that the areas shaded in green on said map designated as a "School" contain about 4 acres and are and since 1942 have been a public kindergarten and public elementary grade school maintained by the Board of Education of the City of Los Angeles; that the area shaded in green upon said map and designated as "Community Chapel" and "Community Church" are places of public worship.

VII.

That it is not true that the area lying westerly of Randall Street and southerly of the southerly line of said "Community" area paralleling Glenoaks Boulevard is and ever since about February, 1933, has been zoned as an "M-3" district; that it is true [174] that said area for many years last past has been excepted from the terms of the Residential District Ordinances of the City of Los Angeles and that the said area was designated

as a "M-3" district under the terms of Ordinance No. 90,500 enacted by the City of Los Angeles on March 7, 1946, and which became effective on June 1, 1946, and at all times since said effective date said area has been and now is designated as a M-3 zone.

VIII.

That it is true that about the year 1934 defendant J. D. Gregg began, and subsequent thereto has accomplished, the excavation of rock, sand and gravel upon a tract of land comprising approximately 62 acres owned by him and lying within said "M-3" zone, the northeasterly boundary of which tract of land lies distant approximately 300 feet southerly from the southwesterly line of Glenoaks Boulevard; that it is true that said defendant J. D. Gregg has substantially exhausted the available supply of rock, sand and gravel from said tract of land save and excepting only from that portion of said tract which has been and is now being used by said defendant for stock piles and plant facilities; that it is true that said defendant Gregg maintains upon said land machinery, equipment and other facilities for the excavation and processing of rock, sand and gravel for the market.

IX.

That it is not true that all of the areas shaded in black upon said map are or upon October 2, 1946, were improved, occupied and used as family homes for human residence; that it is true that

some of said areas, and a substantial portion thereof, were for more than five years last past and now are so improved, occupied and used.

X.

That it is true that the lands shaded in yellow and designated as an "Unrestricted" area on said map lie within the [175] natural channel of the easterly branch of the Tujunga Wash and that said lands are and always have been unrestricted as to their use for the commercial production of rock, sand and gravel.

XI.

That it is true that during the year 1907 Los Angeles Land & Water Co., a corporation, was the owner and in possession of approximately 3,000 acres of land including the so-called "Community" area and the so-called "Unrestricted" area, and lands adjacent thereto; that it is true that in or about the year 1907 the said Los Angeles Land & Water Co. caused said lands to be surveyed but that it is untrue that the said lands were classified with respect to their natural adaptability for residential, horticultural or agricultural development and use or with respect to their natural adaptability for the commercial production of rock, sand and gravel; that it is true that said Los Angeles Land & Water Co., in or about the year 1907, did arbitrarily designate the lands lying within the so-called "Unrestricted" area as "Stone Lands"; and that it is true that the commercial production of rock,

sand and gravel was then and at all times since has been the highest, best and most valuable use to which the land arbitrarily designated as stone land, as aforesaid, was and now is adapted; that it is not true that a pit excavation in said so-called "Unrestricted" area is or ever was susceptible to refilling by the passage of water, rock, sand or gravel; that it is true that ever since the construction of Hansen Dam there has been substantially no passage of water over or upon the said so-called "Unrestricted" area.

XII.

That it is not true that the residential, horticultural or agricultural development of lands lying in the so-called "Community" area was, is or at any time has been the highest, best and most valuable use to which said lands are adapted; that it is true that some portion of said area is adaptable to residential [176] and agricultural development and is overlaid with a substantial stratum of sandy loam and is within an area of climatic conditions favorable for human residence and plant growth; but the Court finds it to be true that the highest, best and most valuable use to which other portions of said area are adapted, and particularly that area designated on said map as the "Critical" area is the commercial production of rock, sand and gravel and that such portions of said area so adapted are not overlaid with a stratum, several feet thick, of rich, sandy loam, but on the contrary are either devoid of any top soil or that said top soil is very

thin and not suitable for plant growth other than growth commonly known as desert growth; that the remaining allegations of paragraph III of plaintiffs' complaint are true.

XIII.

That it is true that during the year 1914 the Los Angeles Land & Water Co. executed a contract for the sale to Fernando Valley Development Company, a corporation, of approximately 2,200 acres of land, including the so-called "Community" area and that during the same year it executed and recorded in the office of the County Recorder of Los Angeles County a declaration by the terms of which the commercial production of rock, sand and gravel within or upon the lands described and referred to in said declaration was prohibited until after the year 1934; that it is true that said restrictions remained in force and effect for twenty years and until the year 1934; that it is true that said restrictions by their terms expired in the year 1934; that it is not true that all of the lands so restricted were best adapted to residential, horticultural or agricultural development and use, and that on the contrary it is true the highest, best and most valuable use of certain of said land so restricted was then and always has been and now is for the commercial production of rock, sand and gravel.

XIV.

That it is true that on or about the 16th day of February, 1916, [177] the defendant City of

Los Angeles enacted its Ordinance No. 33,761 N. S.; that it is true that the area described in said complaint as the so-called "Community" area was not a part of and did not lie within the corporate limits of the City of Los Angeles at the time said ordinance was adopted and that said area was not annexed to the City of Los Angeles until the year 1918; that it is true that said Ordinance No. 33761, as amended, remained in force and effect until superseded by Ordinance No. 74,140, enacted by the said City of Los Angeles and which became effective on or about October 27, 1934; that it is true that Ordinance No. 74,140 became effective on or about October 27, 1934, and superseded Ordinance No. 33,761 N. S. and all amendments thereto, but it is not true that said Ordinance 74,140 superseded all variances granted or exceptions from the terms of said Ordinance 33,761 N. S.

XV.

That it is not true that Ordinance No. 74,140 classified the lands which comprise said so-called "Community" area as adapted to residential development and use and it is not true that said ordinance prohibited the conduct of any operation within or upon said land for the commercial production of rock, sand and gravel; that it is true that said ordinance did designate the lands therein described and referred to and comprising the greater portion of the San Fernando Valley as a residential district and prohibited the use for purposes other than residential purposes unless and

until a variance for such other use was obtained pursuant to the terms of said ordinance or unless and until the lands proposed to be devoted to such other use were excepted from the terms of said ordinance by subsequent ordinances amendatory thereof or supplemental thereto; that it is true that said Ordinance 74,140 was adopted by the City of Los Angeles for the purpose of holding in status quo the uses to which land in the area therein described could be put until such time as a comprehensive survey could be completed by the City of Los Angeles [178] and a comprehensive zoning ordinance adopted; that it is true that said Ordinance 74,140 remained in force and effect until superseded by Ordinance 90,500, which became effective on or about June 1, 1946.

XVI.

That it is true that one, C. S. Smith, and one, William Evans, on or about August 24, 1934, made written application to the Planning Commission of the City of Los Angeles for a variance permit to conduct operations for the commercial production of rock, sand and gravel upon Lots 9 and 10 in Block 22 within the so-called "Community" area; that it is true that on or about July 7, 1936, Claire Schweitzer made a similar application covering Lots 5, 6, 7, 13 and 14 in Block 19 of said so-called "Community" area; that it is true that on or about August 5, 1936, H. I. Miller made similar application covering Lots 9 and 10 in Block 22 within said area; that it is true that on or about

July 7, 1936, Ray Schweitzer made similar application covering Lots 5, 6, 7, 13 and 14 in Block 19 within said area; that it is true that in or about the month of January, 1940, John D. Gregg made similar application covering a portion of Lots 12 and 24 in Block 18 within said area; that it is true that F. H. Haines in or about the month of March, 1941, made similar application covering Lot 7 in Block 20 within said area; that it is true that in or about the month of November, 1945, Sam and Pauline Katz made application to said Planning Commission for a variance permit to operate a riding academy at No. 9821 Stonehurst Avenue, lying within said area; that it is true that each and all of said applications, as aforesaid, were denied by the Planning Commission of the City of Los Angeles, and that it is true that in those instances in which an appeal was taken by the applicant to the City Council of the said City of Los Angeles, that said appeal was denied by said City Council; that it is true that about the year 1933 the City Council of the City of Los Angeles adopted Ordinance No. 72,855 [179] effective June 30, 1933, granting to Frank Lotito and John Lotito an exception from the residential district ordinance authorizing them to erect and maintain a winery upon that certain five-acre parcel of land marked "A" upon the map attached to plaintiffs' complaint and marked therein Exhibit "A" and that thereafter and in about the year 1933 West Coast Winery, Inc., a corporation, one of the plaintiffs herein, and successor in interest to the said Frank Lotito

and John Lotito, did construct and improve said premises by a large and substantial building with underground storage facilities at a cost of in excess of $150,000.00, for operation as a winery and distillery and retail liquor store and that said West Coast Winery, Inc., a corporation, ever since has been and now is conducting thereon the business of a winery and distillery and retail liquor store; that said property of said West Coast Winery, Inc., is located in the so-called "Community" area and immediately adjacent to the so-called "Critical" area; that it is true that about the year 1932 the City Council of the City of Los Angeles adopted Ordinance No. 71,448 effective June 13, 1932, granting an exception from the said residential district ordinance for the construction and operation of an asphalt hot plant on Lot 18, Block 17 in the so-called "Critical" area; that it is true that on January 23, 1946, in Zoning Administrator Case No. 8847 a Zoning Administrator variance for the construction and maintenance of a stable located at 9883 Helen Avenue in the "Community" area situated across Art Street from the property of Plaintiff Jackson Earl Wheeler was granted and that at all times since said date the stable has been and is now being maintained on said premises.

XVII.

That it is true that about the year 1928 certain residents within and adjacent to said so-called "Community" area petitioned the Park Commission of the City of Los Angeles for an election for the

purpose of authorizing the issuance of bonds to acquire and improve certain land within said so-called "Community" area as a public recreation and assembly center, and that thereafter said election was held and said bond issue approved and the bonds thus authorized were issued and sold; that it is true that thereafter the City of Los Angeles purchased and improved as a place for public recreation that certain area designated upon Exhibit "A" attached to the complaint herein as the "Community Park"; that it is true that a portion of the principal sum of said bonds is unpaid and constitutes a lien on the lands owned by plaintiffs herein as well as upon other lands situated within the Municipal Improvement District organized pursuant to said election.

XVIII.

That it is not true that when the residents of the so-called "Community" area petitioned for said election and voted said bonds that they knew or that the facts were that the land holdings of the Los Angeles Land & Water Co. had been classified or restricted, except as has been hereinabove found to be true; and that it is not true that the City of Los Angeles by the enactment of its zoning ordinances had prohibited any extension within said so-called "Community" area of any operations for the commercial production of rock, sand and gravel, except to the extent and in the manner hereinabove found to be true; that it is true that prior to said election the said City of Los Angeles had by the

enactment of numerous and sundry ordinances granted exceptions from the zoning ordinances then in effect so as to permit the use of certain lands in and about the area covered by said zoning ordinances for purposes other than residential; that it is true that the lands lying within [181] said so-called "Community" area had been sold subject to the terms of the deed restrictions and zoning then in effect; that it is not true that the said so-called "Community" area was being developed or used solely as a residential area in reliance upon said restrictions or zoning; that it is true that said restrictions by their express terms expired in the year 1934.

XIX.

That it is not true that the residents of said so-called "Community" area would not have petitioned for said election or voted said bonds had not said residents understood or believed that such area would continue to be developed or used solely as a residential area within which operations for the commercial production of rock, sand, and gravel would be prohibited, and that it is not true that said residents so understood or believed; that it is true that the Municipal Improvement District organized as a result of said petition and election included within its boundaries not only the so-called "Community" area but also a much larger area consisting of lands surrounding and adjacent to said so-called "Community" area; that it is true that the recreational facilities established as aforesaid, have been

and now are maintained under the management and supervision of the Playground Commission of the City of Los Angeles and are patronized and used by the residents of said so-called "Community" area and others.

XX.

That it is true that prior to the year 1942 Los Angeles City Board of Education maintained the Remsen Avenue Elementary Grade School on Glenoaks Boulevard at the northeast corner of its junction with Truesdale Avenue; that it is not true that in the year 1942 residents, including the "Community" area residents, whose children attended said Remsen Avenue School, requested said Board of Education to abandon said school because of its proximity to prospective permissible operations for the commercial production of rock, sand and gravel, or the hazards to the pupils of said school incident to said operations or because of heavy trucking traffic or because of noise and dust incident to the production of rock, sand and gravel or trucking operations; that it is not true that said residents petitioned said Board of Education to establish a new school for said abandoned school; that it is true that said Remsen Avenue School was abandoned in about the year 1942 and that at said time the Stonehurst School was established on Stonehurst Avenue within said so-called "Community" area but said Remsen Avenue School was abandoned at the instance of the Board of Education in order that it and another small elementary school located in the same general

area might be combined into one larger school at the present site of the Stonehurst Elementary School, and for no other reason; that at the time when said school was abandoned it was not known to the residents of said area or to any other residents or to anyone whomsoever or to the members of the Board of Education of the City of Los Angeles, and it was not the fact that for more than 28 years immediately theretofore the owners or subdividers of the land lying within said so called "Community" area or the Planning Commission of the City of Los Angeles or the Playground Commission of the City of Los Angeles or the Board of Education of the City of Los Angeles or the City Council of the City of Los Angeles had declared or ever did declare or had maintained or ever did maintain any policy whatsoever of prohibiting within said so-called "Community" area any extension of operations for the commercial production of rock, sand and gravel; that it is not true that either or any of the owners or subdividers of said lands or the Planning Commission or the Playground Commission or the Board of Education or the City Council of the City of Los Angeles did encourage or ever has encouraged either by a policy of restriction or otherwise the development of said so-called "Community" area as a residential district either with a minimum risk of danger incident to heavy trucking traffic upon the highways or the proximity of pits excavated in the commercial production of rock, sand and gravel or otherwise or at all; that it is not

true that pits excavated in the commercial production of rock, sand and gravel are dangerous or attractive to children of kindergarten or elementary school grade ages; that it is not true that dust, dirt and noise customarily or inevitably results from the commercial production of rock, sand and gravel.

XXI.

That it is not true that at the time of the abondonment of said Remsen Avenue School the residents of said so-called "Community" area or the Board of Education or the Planning Commission or the Park Commission or the Playground Commission or the City Council of the City of Los Angeles knew, and it is not the fact, that the establishment and maintenance of places frequented by the public, including schools, playgrounds, churches, assembly halls or highways, was extremely inadvisable in a vicinity where pits were excavated or other operations conducted for the commercial production of rock, sand and gravel, either because of a hazard to the safety, well-being or comfort of the residents of such a community or to the children of said residents, or to any other person or persons whomsoever, or because the presence of such conditions would be prejudiciously attractive to such children or prejudicial to the general public welfare, health or safety, or otherwise or at all; that such conditions were not and are not prejudiciously attractive to children and are not prejudicial to the general public welfare, health or safety.

XXII.

That it is not true that the said Board of Education was ever informed by the City of Los Angeles that it was the permanent or any other policy of said City of Los Angeles to prohibit within the so-called "Community" area or to exclude therefrom any extension of any operation for the commercial production of rock, sand or gravel or to encourage the development or use of said so-called "Community" area for residential purposes.

XXIII.

That it is not true that said City of Los Angeles made any representations whatsoever either to the Board of Education or to the residents of the area served by said Remsen Avenue School or to the residents of the so-called "Community" area, and that it is not true that said Board of Education or any of said residents believed any representations of said City to be true; and that it is true the said Remsen Avenue School was not abandoned in 1942 because of or in reliance upon any representations of the City of Los Angeles regarding any permanent or other policy of said City of Los Angeles with respect to said "Community" area or otherwise, and that it is not true that said Stonehurst School was constructed or placed in use upon its present site on Stonehurst Avenue in said "Community" area in reliance upon any representations of the City of Los Angeles or any person or persons whomsoever.

XXIV.

That it is true that during the years 1945 and 1946 and prior thereto the City of Los Angeles made an extensive survey under its Master Plan of zoning of the area lying within the boundaries of said municipality in the San Fernando Valley; that said survey and study was made through the Planning Commission of said City of Los Angeles for the purpose of preparing and promulgating comprehensive zoning ordinances; that it is not true that the said Planning Commission, the Engineering Department, or the City Council, or the Mayor of the City of Los Angeles determined or concluded that the general public welfare, safety, comfort or convenience of the residents within said so-called "Community" area, or any other residents, either justified or required the restriction against any extension within said "Community" area of any operation for the commercial production of rock, sand and gravel; that it is true that during the period of said survey and the preparation of said comprehensive zoning ordinances, there was prepared by the staff of the City Planning Commission a tentative map of a portion of the San Fernando Valley, and that said map indicated thereon the zoning restrictions which the staff of said City Planning Commission believes best adapted to the several areas included within the boundaries of said map, and that during the period commencing about the month of July, 1944, and ending in the month of February, 1946, the so-called "Critical" or "Per-

mit'' area was shown on said map as being zoned M-3; that it is true that under the comprehensive zoning ordinance then in preparation, Zone M-3 would and did permit the excavation for the commercial production of rock, sand and gravel; that it is true that the Planning Commission of the City of Los Angeles did give its express approval to the zoning of said ''Critical'' or ''Permit'' area as M-3 zone; that it is true that the Planning Commission during the month of December, 1945, ordered the tentative zoning of said ''Critical'' or ''Permit'' area to be changed to R-A, after having received a petition signed by approximately 140 residents of the Roscoe area protesting against the excavation of said so-called ''Critical'' or ''Permit'' area for the commercial production of rock, sand and gravel.

XXV.

That it is true that on or about the 7th day of March, 1946, the City Council of the City of Los Angeles enacted its Ordinance No. 90,500, which became effective June 1, 1946; that it is true that in and by Ordinance No. 90,500 the property lying within the so-called ''Community'' area was zoned R-A, which zoning allowed the use of said land for Residential-Agricultural purposes; that it is true that under said R-A zoning the production of rock, sand and gravel in the so-called ''Community'' area was prohibited; but it is true that Section 12.24 of said Ordinance No. 90,500 [186] did then provide and has always provided that the development of natural resources may be permitted in any zones

from which such development is otherwise prohibited by the terms of said ordinance, provided that the Planning Commission in the first instance, or the City Council of the City of Los Angeles on appeal, under the provisions of Section 12.32 of said ordinance finds that such use is deemed essential or desirable to the public convenience or welfare and is in harmony with the various elements or objectives of the Master Plan. [187]

XXVI.

That it is not true that either under or by reason of any encouragement derived from the natural adaptability of the land lying within the so-called "community" area to residential development or use or by reason of any restrictions imposed or maintained thereon, either by private restriction or governmental zoning, or otherwise, that said so-called "community" area developed by either steady or substantial growth or improvement, either up to October 2, 1946, or otherwise, or at all; that it is not true that said so-called "community" area either on said date or at any other date was or is predominantly or substantially a residential community; that it is true that said so-called "community" area contains a substantial number of homes of a substantial value and that a substantial number of residents reside therein, and that within the boundaries thereof there is an elementary grade school, public recreational facilities, church facilities, an American Legion Hall, a medical clinic, concrete paved

streets, water, gas and electrical facilities and transportation facilities; but that it is not true that any of said improvements were constructed or installed by reason of any encouragement derived from private restrictions or by governmental zoning.

XXVII.

That it is not true that either during the fifteen (15) years immediately preceding October 2, 1946, or at any other time, that the highest or most valuable use of said so-called "community" area, and more particularly, the so-called "critical" or "permit" area, was for residential use or development; that it is not true that during said period, or at any time, or at all, the market value of the land within said "community" area, or any part thereof, increased from Five Hundred Dollars ($500.00) an acre to about Five Thousand Dollars ($5,000.00) an acre, or to any other sum in excess of Twenty-five Hundred Dollars ($2,500.00) [188] per acre, and some of said land has not substantially increased in market value at all; that it is true the assessed valuation of said land for public taxation has been substantially increased during the fifteen (15) years immediately preceding October 2, 1946.

XXVIII.

That it is true that during the year 1941, defendant John D. Gregg became president and manager of the Los Angeles Land and Water Company, a corporation, and ever since said date has been and

now is said president and manager of said corporation; that it is true that said defendant John D. Gregg owns a substantial interest in said corporation, to wit, that said defendant John D. Gregg owns approximately eight per cent (8%) of the outstanding capital stock of said corporation; but that it is not true that said defendant John D. Gregg owns a controlling interest in said corporation; that it is true that at the time said John D. Gregg acquired his interest in said corporation, he knew that the land lying originally within the so-called "community" area had been originally owned by said corporation and had been restricted by deed restrictions as to its use by said corporation, and that said restrictions by their terms expired in the year 1934; but that it is not true that said John D. Gregg knew when he acquired his interest in said corporation, and it is not the fact, that said corporation had classified said land or that the defendant City of Los Angeles had zoned said land solely for residential, horticultural or agricultural development and use, excepting that the said corporation had previously and in the year 1907 designated certain adjoining lands as "stone lands," and excepting that the City of Los Angeles had previously included the so-called "community" area within the terms of the Residential District Ordinance as hereinabove set forth along with the greater portion of that area of the San Fernando [189] Valley lying within the boundaries of the City of Los Angeles.

XXIX.

That it is true that during the period of about five (5) years immediately preceding the commencement of this action, defendant John D. Gregg acquired by purchase or by lease in separate parcels and at several different times the land which comprises about one hundred and fifteen (115) acres and constitutes the so-called "critical" or "permit" area as shown upon the map; that it is not true that when said defendant John D. Gregg acquired each, or any parcels of land, that he knew, and it is not the fact, that said land had in 1914, or at any other time, been classified by the Los Angeles Land and Water Company as best adapted to residential, horticultural or agricultural development or use; that it is true that said defendant John D. Gregg did know that said land by deed restrictions executed in the year 1914 by the Los Angeles Land and Water Company had been restricted against the excavation of rock, sand and gravel; and that it is also true that said defendant John D. Gregg knew that said restrictions by their terms had expired in the year 1934; that it is true that said defendant John D. Gregg did know that certain zoning ordinances applicable to said land had been enacted by the City of Los Angeles prior to the year 1946; that it is not true that said defendant John D. Gregg knew of six (6) applications having been made to the City of Los Angeles for a variance permit to conduct operations for the commercial production of rock, sand and gravel within said so-called "community"

area, or within said so-called "critical" area, or that said applications had been denied, or that he had any knowledge of any applications or denials thereof whatsoever, saving and excepting one (1) application made by defendant John D. Gregg in the year 1940 covering a portion of Lots 12 and 24 in Block 18, and also excepting an application for such variance filed by one Schwitzer; that it is [190] true that when defendant John D. Gregg purchased said land, he knew, and the facts were, that within said "community" area their existed certain homes, schools, churches and a public park with recreational facilities; but that it is not true that said defendant John D. Gregg knew, and it is not the fact, that such homes, schools, churches, parks or recreational facilities were developed, built or maintained either in reliance upon such restrictions or in reliance upon the permanency of zoning; that it is not true that any paved highways, kindergarten, elementary grade school facilities, community recreational and park facilities, American Legion Hall, medical clinic, transportation facilities, public utility facilities or fire protection facilities were constructed established or maintained in reliance upon any deed restrictions or zoning regulations; that it is not true that the intrinsic value or market value or assessed value for purposes of taxation of any of the lands within the so-called "community" area had substantially or otherwise appreciated, or that said lands ever were in substantial demand for residential development or use in consequence of any deed restrictions or zoning regulations.

XXX.

That it is not true that at the time the defendant John D. Gregg purchased the first parcels of the land acquired by him in the so-called "critical" area that he intended to apply to the City of Los Angeles for a variance permit to enable him to excavate said lands for the commercial production of rock, sand and gravel; but that it is true that when said defendant John D. Gregg subsequently purchased other parcels of said land that he did intend to apply for such variance permit; that it is true that said John G. Gregg did not purchase all of said lands in his own name; that it is true that said John D. Gregg caused certain of said lands to be purchased in the name of Title Insurance and Trust Company, a corporation, as trustee, and caused other parcels to be purchased [191] in the name of his attorney, Donald J. Dunne; that it is not true that he secretly contracted for said land, or that he concealed from the vendors of said land at the time of such purchase, his intention to apply for a variance permit to enable him to conduct operations for the commercial production of rock, sand and gravel; that it is not true that said defendant John D. Gregg, or any of his agents, attorneys, or employees, either actively or otherwise, encouraged any of said vendors to believe that said purchases were being made for the purpose of developing and using said lands for residential purposes; that it is not true that any of said vendors would not have sold his said land to defendant John D.

Gregg if said vendors, or any of them, had known that the said land was being purchased for the benefit of said defendant Gregg, or that he intended to apply for such variance permit.

XXXI.

That it is not true that when defendant John D. Gregg purchased said lands comprising said so-called "critical" area, or at any other time, he knew, and it is not true that the facts then were, or ever have been, or now are, that any substantial operation upon said land within the so-called "critical" area for the commercial production of rock, sand and gravel would create or constitute a substantial or serious or dangerous hazard or detriment either to the general public welfare or the health or the safety either to the inhabitants of the so-called "community" area or otherwise, or that said operations would substantially or materially or at all interfere with or interrupt or disturb or impair the use or comfortable enjoyment of the properties within said so-called "community" area either by the owners or by the inhabitants of said properties, or any of them, or that such operations would substantially or otherwise depreciate either the intrinsic value or the reasonable market value of any of the lands lying within said area, or would create a reasonable [192] or any apprehension that, or that such operations would eventually, or at all, result in a substantial or any erosion of any highways abutting upon the so-called "critical" area, or of the lands abutting upon any highways immediately

opposite said "critical" area, or elsewhere, or that such operations would be prejudicial to the general public welfare or convenience or would not be in harmony with the various elements or objectives of the master plan of zoning of the City of Los Angeles.

XXXII.

That it is true that subsequent to the purchase by said defendant John D. Gregg of the parcels of land which now comprise the said so-called "critical" area and subsequent to the enactment of Ordinance 90500 of the City of Los Angeles and on June 2, 1946, the said Gregg did apply to the Planning Commission of the said City of Los Angeles for a conditional use permit under the provisions of Section 12.24 of said Ordinance 90500 authorizing him to conduct operations for the commercial production of rock, sand and gravel from and upon said lands which now comprise said so-called "critical" area; that it is true that in support of said application said defendant Gregg represented to the City of Los Angeles that the property constituting the so-called "critical" area was situated in a district, the character of which was unsuited for residential purposes, that said land was composed of gravel beds and was suitable primarily only for the production of rock, sand and gravel, that his proposed use of said land was in harmony with the various elements and objectives of the master plan of zoning as enacted by said City of Los Angeles; that while there were about three hundred and ten (310) acres of

rock-bearing land in the M-3 zone in the San Fernando Valley, that approximately only Twenty Three Million (23,000,000) tons were available to the then existing plant facilities, and that such tonnage was not sufficient to meet the demands [193] of the market in and about the City of Los Angeles for rock aggregates for any reasonable period of time, and that the public necessity, convenience and general welfare required that said permit be granted; that it is true that said defendant John D. Gregg represented to said City of Los Angeles that his proposed use of said lands would not be detrimental to the developments surrounding the lands as to which said permit was sought, or that it would not adversely affect individual property rights of property owners in the vicinity of said "Critical" area or affect any legal rights of any such property owners; that the Court further finds that the proposed use of said lands by said defendant John D. Gregg in accordance with the said Conditional Use Permit issued to him pursuant to said application, will not adversely or otherwise affect individual property or legal rights of any property owners in the vicinity of the said "Critical" area, or elsewhere.

XXXIII.

That it is not true that when said application was made by said defendant John D. Gregg, that it was a fact, or a matter of public record or of common knowledge or that defendant John D. Gregg knew that since the year 1935, twenty children, or any

greater number of children than three, had accidentally lost their lives in gravel pits in the San Fernando Valley created by the commercial production of rock, sand and gravel, or that more than one child had sustained serious, or any other injuries in said pits.

XXXIV.

That it is not true that on August 20, 1946, the Planning Commission of the City of Los Angeles denied said application of John D. Gregg, that it is true that after a public hearing, the Planning Commission on July 25, 1946, did, by unanimous vote of its members, deny said application; that it is not true that said Planning Commission found as a fact, but that it is true that said [194] Planning Commission, pursuant to the request of the City Council made under the provisions of Section 12.32e of Ordinance Number 90500, did on August 20, 1946, inform said City Council in writing that the reasons why the Planning Commission had denied said applicaton were as follows:

"1. That the property in question can be utilized for residential purposes as evidenced by the residential development in the immediate neighborhood and, hence, the present 'RA' zoning is appropriate for the property and general area.

2. Protests filed by a substantial number of property owners in the vicinity against the requested use indicate that it would interfere with a reasonable enjoyment of their homes and community facilities.

3. That the extensive excavations and pits left after operations have been completed create an unsightly and dangerous condition which is detrimental to the public welfare, particularly from the standpoint of safety and, in addition, leaves the land in a condition unsuited for a use in keeping with others in this community.

4. That it was not shown conclusively that public convenience would be best served by permitting the extension of operations onto the subject property. On the contrary, the Commission feels that to permit the creation of a condition such as that referred to above would adversely affect individual property rights and interfere with the normal growth of this community, thereby conflicting with the objectives of the Master Plan.

5. From the best information available, the Commission finds that there are approximately 450 acres of [195] potential rock and gravel deposits in the M3 zone which are located in the immediate vicinity and wherein the use requested is permitted as a matter of right. It is stated by the applicant that this M3 zoned area includes 310 net acres."

That it is not true that the Planning Commission found or gave as a reason for the denial of said application that the then existing zoning which prohibited the commercial production of rock, sand and gravel, from or upon the lands as to which such permit was sought was an appropriate zoning for

said property or for the general area in which such property was situated, or that the proposed use of said lands would interfere with a reasonable enjoyment by a substantial number of property owners in that vicinity of their homes or community facilities.

XXXV.

That it is true that after the denial of his said application for said conditional use permit, the said defendant John D. Gregg did appeal to the City Council of the City of Los Angeles from the denial by said City Planning Commission of his said application, and it is true that on October 2, 1946, the said City Council of said City did grant said application and did grant said John D. Gregg a conditional use permit authorizing him to excavate upon said so-called "critical" area for the commercial production of rock, sand and gravel; and that it is true that said permit was granted upon the following conditions, to wit:

1. That the applicant construct a 6-foot cyclone type mesh wire fence around the said property, including barbed wire on the top of said fence providing the Fire Department grants permission for same.

2. That no permanent plant building or structure be installed or maintained on said property and that all material excavated be mined by an electrically powered [196] shovel and primary crusher and transported by a conveyor belt system running through a tunnel or

tunnels under Glenoaks Boulevard to the plant now owned and operated by applicant, lying southwesterly of said Boulevard and processed at said plant.

3. That a setback line of fifty feet from all property lines and existing streets be maintained and that slopes of excavations be maintained at one foot to one foot.

4. That the area between all property lines or street lines and 50 foot setback be screen planted progressively as excavations proceed.

XXXVI.

That it is true that Ordinance No. 90500 was adopted by the City Council of the City of Los Angeles on March 7, 1946, and that said permit was granted by the Council by an affirmative vote of eleven (11) of the members thereof; that it is not true that the City Council at the time it adopted Ordinance No. 90500 found or determined upon an exhaustive re-survey or study of zoning planning in the San Fernando Valley, or at all, that the conditions or developments within said "community" area justified or required for the promotion of general welfare, the preservation of the public health or safety, the protection of property rights, or otherwise, that the extension of any operations for the commercial production of rock, sand or gravel should be prohibited; that it is not true that no change of any character occurred between the date of the adoption of the Ordinance No. 90500 and the

date of granting said conditional use permit, or between the enactment of zoning ordinances adopted in the City of Los Angeles in 1916 and 1946 respectively; that it is not true that the general public welfare or safety of the inhabitants of the "community" area in which said "critical" area is located or the preservation of [197] property rights of the property owners in such "Community" area required a prohibition or a continuance of a prohibition of such operation within the "Community" area.

XXXVII.

That it is not true that the granting of such Conditional Use Permit in any way adversely affected the Master Plan of zoning of the City of Los Angeles as defined by Ordinance No. 90,500.

XXXVIII.

That it is not true that the conduct of the eleven (11) members of the City Council of the City of Los Angeles who voted in favor of granting said Conditional Use Permit on October 2, 1946, was either arbitary or unreasonable or unfair or capricious or farcial; that it is not true that about one and one-half hours of the time of said session of said City Council was allotted by said City Council to said John D. Gregg; and that it is not true that barely twenty minutes were allowed to the opponents of said application, including plaintiffs in this action and the representatives of the Board of Education and Playground Commission of said

City; that it is true that the City Council allotted to John D. Gregg a period of thirty minutes to present his case and an equal amount of time, to-wit, thirty minutes to the opponents to present their case; that it is not true that the attitude, conduct or votes of any of said eleven (11) members of said City Council, is or was inexplicable upon any rational grounds; and that it is not true that the attitude, conduct or votes of said eleven (11) members of said City Council ever was or now is utterly or at all repugnant to the concept or objectives of the Master Plan of zoning of the City of Los Angeles or subversive to the public welfare or health or safety or the property rights of the land owners or residents within said so-called "Community" area, including the plaintiffs in this action, or any other person or persons whomsoever. [198]

XXXIX.

That it is not true that there did not exist at the time that said application was made, or that there does not now exist, or that there ever has existed any necessity either public or private for the commercial production of rock, sand or gravel, from or upon the lands which comprise the so-called "critical" area; that it is not true that the use of said property for the excavation of rock, sand and gravel is not and has not been essential or desirable to the public convenience or welfare; that it is not true that the said use of said property is not in harmony with the various elements or objectives of the Master Plan of zoning of the said City of Los Angeles.

XL.

That it is not true that there is now and for many years last past has been an adequate available quantity of commercial rock, sand and gravel in the natural deposits of said materials in the area of Los Angeles County wherein the commercial production thereof is permissible and economically feasible to supply all of the needs and demands for said materials; that it is not true that the permanent prohibition of the excavation upon the so-called "critical" area for the commercial production of rock, sand and gravel would not create any material shortage in the available quantity of said material in any market available for said material; that it is not true that such prohibition would not tend to deprive any potential consumer of such material of the supply of such materials adequate to satisfy the needs of such consumer; that it is true that the rock plant now being operated by John D. Gregg in the area immediately southerly in the so-called "critical" area is now producing and for many years last past has produced approximately thirty-five per cent (35%) of all of the rock, sand and gravel which is and has been produced from the San Fernando gravel cone; that it is true that the said John D. Gregg [199] has substantially exhausted the supply of such materials which are available for excavation from his said property lying outside of the so-called "Critical" area; that it is true that if the said John D. Gregg is denied the right to excavate for the commercial production of rock, sand and gravel from the area within the so-called

"Critical" area that the said defendant John D. Gregg will be forced within a short period of time to suspend the operations of his said rock plant lying southerly of Glenoaks Boulevard which would deprive the consumers of such materials who are most economically supplied from the San Fernando gravel cone, of approximately thirty-five per cent (35%) of their requirements; that it is true that there are no plant facilities available in the San Fernando Valley of sufficient capacity to supply any portion of said deficit of thirty-five per cent (35%) of rock, sand and gravel to the market, which said rock plant of said John D. Gregg is now capable of processing for the market;

That it is not true that at the time said application of said John D. Gregg was made and that it is not true that there has been at all times since and now are substantial or any stock piles of processed materials in the processing plants in the San Fernando Valley for which there has not been, and is not now, any market demand; that it is true that the only stock piles at the processing plants in the San Fernando Valley are those which are ordinarily and necessarily maintained incident to the daily operation of such plants.

XLI.

That it is true that defendant John D. Gregg intends to immediately begin the excavation for the commercial production of rock, sand and gravel from the land which comprises the so-called "Critical" area; that it is not true that said defendant John D. Gregg intends to excavate said "Critical"

area to a depth of One Hundred Fifty feet (150′), or to any other depth in excess of One Hundred feet (100′); that it is true that said defendant John D. [200] Gregg, pursuant to the terms of said conditional use permit, intends to excavate said area with a side wall slope of not more than one horizontal foot for each vertical foot of depth, and that the said Gregg intends to and will maintain a setback of not less than fifty feet (50′) from the exterior property lines and existing streets bounding the said so-called "critical" area; that it is not true that the structure or the placement of the materials that compose said lands are such that there is a reasonable probability or expectancy that in the course of time by natural processes of erosion or otherwise, that the side walls of a pit on said "critical" area at its upper surface would recede so that the said pit would substantially or at all encroach upon any public streets or upon any of the lands which now bound said so-called "critical" area, or upon the lands abutting upon streets opposite the lands which comprise said so-called "critical" area or upon any other lands whatsoever.

XLII.

That it is not true that any operation in the excavation of rock, sand or gravel within or upon the so-called "critical" area would necessarily, either frequently or daily, or at all, pollute the air with dust or dirt, or that any dust or dirt emanating from said "critical" area, either in substantial or obnoxious quantities, would be carried by the

winds to the property of plaintiffs, or of any other persons within the so-called "community" area, or would be deposited upon said properties, or any of them, or in the homes or upon the persons of said plaintiffs, or any other persons; that it is not true that any pollution of the air or deposits of dust or dirt, either upon the properties or persons or within the homes of said plaintiffs or any other persons, will be a natural or necessary consequence of any excavation within or upon said lands for the commercial production of rock, sand and gravel; that it is not true that any operations [201] upon said "critical" area for the commercial production of rock, sand and gravel would constitute either a dangerous or an obnoxious or a deleterious condition either upon the premises of plaintiffs or upon any other persons or upon the highways or in places of public gathering or within the said "community" area or elsewhere, or would substantially or at all deprive said plaintiffs or any other persons of any right to enjoy, or the enjoyment of their properties or homes or highways or places of public gathering, either within said "community" area or elsewhere.

XLIII.

That it is not true that the excavation of rock, sand and gravel on a commercial scale within or upon said critical area would, as a natural or necessary consequence thereof, produce loud or rasping or obnoxious noises; that it is not true that the operations in excavation of rock, sand and gravel on a commercial scale would produce noises which

would necessarily penetrate to the properties or homes of plaintiffs or to other persons similarly situated in the "community" area, or would substantially or materially disturb plaintiffs or any of them, or any other persons in their respective use or enjoyment of their property or properties or homes or would substantially impair or diminish their enjoyment respectively of their properties or homes or highways or places of public assembly within said "community" area or elsewhere.

XLIV.

That it is not true that any commercial production of rock, sand and gravel within said "critical" area or any other place would as a natural consequence thereof substantially depreciate the intrinsic value or market value of any or all of the lands within said "community" area outside of said 'critical" area, or any other place. [202]

XLV.

That it is true that each of the several named plaintiffs referred to in paragraph XXVII of plaintiffs Complaint are the owners of the parcels of land which they are alleged to own in said paragraph and were the owners of said parcels of land, and that said land was improved and used as alleged in paragraph XXVII of said complaint.

XLVI.

That it is not true that this action was brought or maintained on behalf of the planning Commis-

sion, the Park Department, Playground and Recreational Department and Board of Education or any of said departments of defendant City of Los Angeles.

XLVII

That it is not true that residents within said "Community" area were and for more than five (5) years last past, or at any other time, have been more than one thousand (1,000) persons, or any other numbers who are not named as plaintiffs herein, who in the enjoyment of their homes in said "Community" area or in their health or safety would be substantially or materially or wilfully or otherwise affected by any operation of commercial production of rock, sand and gravel within or upon the "Critical" area; that it is true that a substantial number of persons object to the commercial production of rock, sand and gravel within the "Critical" area. [203]

XLVIII.

That it is not true that said so-called "Community" area for more than one year continuously preceding the grant of said Conditional Use Permit was under extensive development for the sub division, improvement or use thereof for residential uses and purposes; that it is not true that continuously for more than one year immediately preceding the grant of said Conditional Use Permit or at any other time, or at all, that there was a heavy or continuing or any demand for residental lots within the said so-called "Critical" area for residential improvement or use.

XLIX

That it is not true that the said "Community" area at any time subsequent to the year 1934 has been restricted against any extension therein of any operation for the commercial production of rock, sand and gravel; that it is not true that plaintiffs, or any of them, acquired his or their premises in reliance upon any knowledge or belief that the so-called "Community" area would be developed or improved or used as a predominantly residential area or would remain immune to any encroachment therein or thereupon of any operation for the commercial production of rock, sand and gravel; that it is not true that there was or is any general policy or ever was any general policy established or maintained by the City of Los Angeles for any such improvement, development or use; that it is not true that Los Angeles Land & Water Co. ever did actively encourage any of the plaintiffs to acquire, improve or use their said property for residential purposes.

L.

That it is true that some of the lands lying within the so-called "Critical" area are substantially the same in structure and placement of the materials of which they are composed or in their top soil condition or in their surface [204] contour as the lands of plaintiffs, but this is not true as to other lands in said area.

LI.

That it is not true that the operation of a primary crusher upon said so-called "Critical" area will produce loud crunching, rasping or obnoxious noises or substantial quantities of dust or dirt; that it is not true that by reason of said primary crusher operation that substantial or any quantities of dust or dirt will be carried by the winds to the homes of the inhabitants of said so-called "Community" area or to schools, churches or other places of public or private assembly within said "Community" area, or will substantially or materially or at all interfere with, interrupt or impair the comfortable enjoyment of plaintiffs' homes or other places of assembly; that it is not true that a substantial or any part of any dust or dirt from said "Critical" area will consist of a granular silica in powdery or other form; that it is not true that any dust or dirt from said so-called "Critical" area is or will be conducive to the development or aggravation of tuberculosis or other respiratory or pulmonary afflictions; that it is not true that screen planting upon the margins of said so-called "Critical" area will be either a sham or a farce; that it is not true that said screen planting would attract or cause the death or injury of children.

LII.

That it is not true that any conduct of the City of Los Angeles either in the exercise of its police power or otherwise in respect of the granting of said Conditional Use Permit was or is oppressive or

discriminatory; that it is not true that said City of Los Angeles either on October 2, 1946, or at any other time, granted to John D. Gregg a special right or privilege denied to other property owners; that it is not true that the act of said City of Los Angeles in granting said Conditional Use Permit was or is in excess of the limits of its police power or was or is in [205] violation of Article 1, Section 21 of the Constitution of the State of California or of the Constitution of the United States; that it is not true that said act was or is void.

LIII.

That it is not true that the granting of said Conditional Use Permit to John D. Gregg constitutes or ever did constitute the taking of any of the property of plaintiffs or any persons whomsoever.

LIV.

That it is not true that the granting of said Conditional Use Permit was or is either an unjust or oppressive or arbitrary exercise of the police power or was or is an unwarranted or any invasion or confiscation of either the property or property rights of said plaintiffs or any other persons.

LV.

That it is not true that the granting of said Conditional Use Permit bears no relation to the ends for which the police power exists; that it is not true that the granting of said permit was or is an invasion of any personal or property rights of said plaintiffs or any other persons.

LVI.

That it is not true that the granting of said Conditional Use Permit was for the purpose of preferring John D. Gregg against any other property owners; that it is not true that only about 35 acres of the property owned by John D. Gregg lying southwesterly of Glenoaks Boulevard has been excavated; that it is not true that said John D. Gregg is or for more than five months prior to the commencement of this action has been or ever was or now is the owner or in control of any unexcavated land situated within the San Fernando Valley other than the land located within the said so-called "Critical" area and his plant and stockpile site southwesterly of Glenoaks Boulevard.

LVII.

That it is not true that operations for the commercial production of rock, sand and gravel within said so-called "Critical" area will substantially or materially or seriously or at all disturb, interfere with, interrupt or diminish the enjoyment by plaintiffs or any other persons of their properties within said so-called "Community" area or will injure or damage such properties.

LVIII.

That it is not true that operations for the commercial production of rock, sand and gravel within said "Critical" area will substantially or materially or at all depreciate the reasonable market value of the properties of plaintiffs or any other persons or that such properties will be substantially de-

stroyed or that said plaintiffs or any other persons will be irreparably or permanently damaged, or damaged at all.

LIX.

That it is not true that defendant John D. Gregg is estopped to claim or exercise his rights and privileges under the terms of said Conditional Use Permit or that he is estopped to conduct operations in said so-called "Critical" area for the commercial production of rock, sand or gravel.

LX.

That it is not true that the City of Los Angeles either by its conduct as alleged in said complaint or otherwise, or at all, is or ever was estopped to grant said Conditional Use Permit or to permit said John D. Gregg to exercise or enjoy any benefit, right or privilege under said Conditional Use Permit or to authorize or permit the operation for the commercial production of rock, sand or gravel within said "Critical" area or any place within said so-called "Community" area.

LXI.

That it is not necessary that either the City of Los [207] Angeles or John D. Gregg be permanently or at all enjoined from authorizing or conducting operations for the commercial production of rock, sand or gravel in said "Critical" area either to prevent wrong or injustice or otherwise or at all; that it is not true that the grant of said Conditional Use Permit is or ever was in excess of the exercise of the police power of the City of Los Angeles.

LXII.

That it is not true that by reason of any conduct of John D. Gregg the occupancy by plaintiffs of their homes has been rendered substantially or materially uncomfortable or that the enjoyment of said properties has been or is substantially, materially or grievously or at all interferred with or impaired by reason of any conduct of said Gregg; that it is not true that plaintiffs have been damaged in the sum of $100,000.00 or in any other sum.

LXIII.

That it is not true that any conduct of John D. Gregg has been, is or ever was oppressive, fraudulent or malicious; that it is not proper that punitive damages in the sum of $250,000.00 or any other sum be assessed against defendant John D. Gregg.

LXIV.

That it is true that on March 7, 1946 the City of Los Angeles enacted Ordinance No. 90,500, which said ordinance became effective on June 1, 1946; that it is true that Section 12.24 of Ordinance No. 90,500 provides in part as follows:

"A. Location of Permitted Uses—Wherever it is stated in this Article that the following uses may be permitted in a zone if their location is first approved by the Commission, said uses are deemed to be a part of the development of the Master Plan or its objectives and shall conform thereto. Before

the Commission makes its final determination a public hearing by the Commission shall be mandatory for certain uses and optional for others:

"1. Uses for which at least one public hearing shall be held include: airports or aircraft landing fields; cemeteries; educational institutions; and golf courses (except driving tees or ranges, miniature courses and similar uses operated for commercial purposes).

"2. Uses for which a public hearing is optional include: churches (except rescue mission or temporary revival); schools, elementary and high; and public utilities and public service uses or structures.

"B. Additional Uses Permitted—The Commission, after public hearing, may permit the following uses in zones from which they are prohibited by this Article where such uses are deemed essential or desirable to the public convenience or welfare, and are in harmony with the various elements or objectives of the Master Plan:

"1. Airports or aircraft landing fields.

"2. Cemeteries.

"3. Development of natural resources (excluding the drilling for or producing of oil, gas or other hydrocarbon substances) together with the necessary buildings, apparatus or appurtenances incident thereto.

"4. Educational institutions.

"5. Governmental enterprises (federal, state and local).

"6. Libraries or museums, public.

"7. Public utilities and public service uses or structures. * * *

"C. Procedure—Written applications for the approval of the uses referred to in this Section shall be filed in the public office of the Department of City Planning upon [209] forms prescribed for that purpose by the Commission.

"The procedure for holding public hearings shall be the same as that required in Sec. 12.32-C.

"The Commission shall make its findings and determination in writing within forty (40) days from the date of filing of an application and shall forthwith transmit a copy thereof to the applicant. No decision of the Commission under this Section shall become effective until after an elapsed period of ten (10) days from the date the written determination is made, during which time the applicant, or any other person aggrieved, may appeal therefrom to the City Council in the same manner as provided for in Sec. 12.32-E.

"In approving the uses referred to in this Section, the Commission shall have authority to impose such conditions as are deemed necessary to protect the best interests of the surrounding property or neigborhood and the Master Plan."

LXV.

That it is true that on June 2, 1946 defendant John D. Gregg filed an application with the Planning Commission of the City of Los Angeles requesting that said Planning Commission grant to him a Conditional Use Permit authorizing him to use the property situated within the so-called "Critical" area for the commercial production of rock, sand and gravel; that it is true that after a public hearing held by the said City Planning Commission on June 20, 1946, that said Commission on July 25, 1946 denied defendant John D. Gregg's application for a Conditional Use Permit; that it is true that thereafter and on August 1, 1946, defendant John D. Gregg appealed pursuant to the provisions of Subsection C of said Section 12.24 to the City Council of said defendant City of Los Angeles from said denial by the said City Planning [210] Commission of said application; that it is true that after a public hearing duly held on September 26, 1946, before the Planning Committee of the City Council of Los Angeles, and after a further hearing before the City Council of said City as a whole, that said City Council did on October 2, 1946, by a vote of eleven of its members, adopt the written Findings and Report of the said Planning Committee, as set forth in Exhibit "B" attached to the Answer of defendant Gregg herein, and did grant to said defendant Gregg a Conditional Use Permit for the commercial production of rock, sand and gravel from the so-called "Critical" area; that

it is true that the use which defendant Gregg will make of said property lying within said so-called "Critical" area is a commercial use and that his operations will be only such as are reasonable and necessary for the operation of said commercial use under the terms and conditions recited in the Conditional Use Permit issued by the City Council on October 2, 1946, and that said operations will not constitute a nuisance and that said Gregg will not employ any unnecessary or injurious methods in said operation.

LXVI.

That it is true that at the hearing before the Planning Committee of the City Council of Los Angeles on the appeal of John D. Gregg from the denial by the said City Planning Commission of his application for a Conditional Use Permit, that evidence both oral and documentary was introduced and that said evidence was and is of a substantial nature and character and was and is in support of the decision of the City Council of the City of Los Angeles in granting to defendant John D. Gregg the said Conditional Use Permit.

LXVII.

That it is true that during the trial of the within cause the said defendant John D. Gregg made certain representations to the Court, as follows:

1. That said defendant John D. Gregg will not conduct any operations in the so-called "Cri-

tical" area lying northeasterly of Glenoaks Boulevard during any hours of the night excepting such operations as might be reasonably necessary to effect repairs to equipment.

2. That said defendant John D. Gregg will house in the primary crusher which he will operate in the so-called "Critical" area lying northeasterly of Glenoaks Boulevard so as to minimize any noise emanating therefrom.

3. That in connection with any and all drag-line operations on the banks or slopes of the pit to be excavated in the so-called "Critical" area lying northeasterly of Glenoaks Boulevard, said defendant John D. Gregg will cause said banks or slopes to be sprinkled with water prior to any such drag-line operations so as to minimize the possibility of dust being carried by the winds beyond the outer boundaries of said so-called "Critical" area.

4. That said defendant John D. Gregg intends to and will as soon as is reasonably practicable, and as soon as material and equipment is available, complete the construction of the dust collection system in his rock crusher plant located southwesterly of Glenoaks Boulevard, the construction of which system was commenced prior to the commencement of this action.

Conclusions of Law

From the foregoing findings of fact the court makes the following conclusions of law:

1. All conclusions of law hereinbefore set forth as findings of fact.

2. Plaintiffs are not entitled to judgment against either of the defendants.

3. The conditional use permit granted defendant Gregg by the City Council of the City of Los Angeles was and is a valid [212] and subsisting permit issued pursuant to the provisions of Ordinance No. 90,500 of the City of Los Angeles.

4. The granting of said conditional use permit was not and is not an unconstitutional grant of a special privilege.

5. The granting of said conditional use permit was not and is not an unjust, oppressive or arbitrary exercise of the police powers of the City of Los Angeles, and was not and is not an invasion or confiscation of any of the properties or rights of plaintiffs or of any other persons.

6. The City of Los Angeles was not and is not estopped to grant said conditional use permit to defendant John D. Gregg, nor to permit or allow said John D. Gregg to conduct operations for the excavation of sand, rock and gravel from the so-called "Critical" area described in the complaint.

7. Defendant Gregg was not and is not estopped to exercise his rights under said conditional use

permit, or to conduct operations for the excavation of sand, rock and gravel within the so-called "Critical" area described in the complaint.

8. Said City of Los Angeles should not be enjoined from granting said conditional use permit or allowing or permitting John D. Gregg to conduct operations for the excavation of sand, rock and gravel from said "Critical" area described in the complaint, in accordance with the terms of said permit.

9. Defendant Gregg should not be enjoined from exercising his rights under said permit or from conducting operations for the commercial production of sand, rock and gravel within the so-called "Critical" area as described in the complaint herein.

10. That the plaintiffs, either collectively or otherwise, have not, nor have any of them, been damaged in any sum or sums of money whatsoever. Neither are the plaintiffs, nor any of them, nor anyone purported to be represented by them, entitled to recover any damages whatever from the defendants or either of them. [213]

11. Each of the defendants are entitled to recover their costs herein.

Let judgment be entered accordingly.

Dated this 10th day of September, 1947.

/s/ ALFRED L. BARTLETT,
Judge.

[Endorsed]: Filed Sept. 10, 1947. [214]

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 522031

JACKSON EARL WHEELER, PATRICK ADAMS, W. L. CALLEY, D. H. CALLEY, ARCHIE I. WAY, LILLIAN LEWIS, W. R. SHADLEY, G. T. WINKLER, DONALD KERSEY, CHARLES WISE, WILLIAM F. BORROWE, T. O. EASLEY, R. E. BERTELL, BETSY ROSS, GEORGE J. KING, FRANK E. WRIGHT, B. R. FONDREN, ROBERT D. HOPKINS, FRANK LUTIZETTI, DWIGHT MOORE, LOUISE R. TAYLOR, FRANK J. SMYTHE, C. C. CAMPBELL, HELEN CHURCHWARD, PAUL C. BROWN, and WEST COAST WINERY, INC., a corporation,

Plaintiffs,

vs.

L. D. GREGG, and the CITY OF LOS ANGELES, a municipal corporation,

Defendants.

Holbrook & Tarr and Clyde P. Harrell, Jr., 740 Rowan Building, Los Angeles 13, Calif., Michigan 2191, and Donald J. Dunne, 215 W. 7th Street, Los Angeles 14, Calif., Trinity 7036, and Guy Richards Crump, 458 So. Spring St., Los Angeles 13, Calif., Trinity 4152, Attorneys for Defendant, John D. Gregg.

JUDGMENT

The above entitled cause came on regularly for trial in Department 15 of the above entitled Court,

before Honorable Alfred L. Bartlett, Judge Presiding, on the 28th day of May, 1947, and was tried by said Court, without a jury, a trial by jury having been expressly waived by all parties, plaintiffs appearing by their attorney, Oliver O. Clark, Esq., and defendant J. D. Gregg appearing by his attorneys, Guy Richards Crump, Esq., Clyde P. Harrell, Jr., Esq., and Donald J. Dunne, Esq., and defendant City of Los Angeles [215] appearing by Ray L. Chesebro, Esq., City Attorney of the City of Los Angeles, and Thomas H. Hearn, Esq., Deputy City Attorney, and evidence both oral and documentary having been introduced on the issues raised by the complaint and answer, and the cause having been fully argued before the Court, and having been submitted by the parties for decision, and after deliberation thereon, the Court having filed herein its Findings of Fact and Conclusions of Law in writing, and the Court having ordered that judgment be entered herein in favor of the defendants and against the above named plaintiffs in accordance therewith;

Wherefore, by reason of the law and the Findings of Fact and the Conclusions of Law of the Court, as aforesaid:

It Is Hereby Ordered, Adjudged and Decreed that plaintiffs take nothing by this action and that said defendant John D. Gregg, sued herein as J. D. Gregg, have and recover his costs herein taxed at $553.80;

It Is Further Ordered, Adjudged and Decreed that said defendant City of Los Angeles, a municipal corporation, have and recover its costs herein taxed at $.....;

It Is Further Ordered, Adjudged and Decreed as follows:

1. That defendant John D. Gregg shall not conduct any operation for the excavation of rock, sand or gravel from the so-called "Critical" area, as described in the complaint herein, lying northeasterly of Glenoaks Boulevard, at any time before 6:00 o'clock a.m. of any day or after 8:00 o'clock p.m. of any day, excepting that the said defendant John D. Gregg shall not be prohibited from making any reasonable or necessary repairs to equipment in said area during other hours.
2. That said defendant John D. Gregg house in any primary crusher which is operated in that portion of the so-called "Critical" area lying northeasterly of Glenoaks Boulevard so as to minimize any noise emanating therefrom.
3. That in connection with any and all drag-line operations on the banks or slopes of any pit excavated by defendant John D. Gregg in that part of the so-called "Critical" area lying northeasterly of Glenoaks Boulevard, that the said defendant John D. Gregg shall cause the banks or slopes of said excavation to be sprinkled with water prior to any such

drag-line operations so as to minimize the possibility of dust from any such operation being carried by the winds beyond the outer boundaries of said so-called "Critical" area.

4. That said defendant John D. Gregg, as soon as is reasonably practicable and as soon as material and equipment is available, shall complete the construction of the dust collection system in his rock crusher plant located southwesterly of Glenoaks Boulevard, the construction of which system was commenced prior to the commencement of this action.

The Clerk of the above entitled Court is hereby ordered to enter this judgment.

Dated September 10, 1947.

/s/ ALFRED L. BARTLETT,
Judge of the Superior Court.

[Endorsed]: Filed and entered Sept. 10, 1947.

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 522,031

JACKSON EARL WHEELER, et al.,

Plaintiffs,

vs.

J. D. GREGG, et al.,

Defendants.

Oliver O. Clark and Robert A. Smith, 643 South Olive Street, Los Angeles, California, TRinity 9457, Attorneys for Plaintiffs.

NOTICE OF APPEAL

To the Defendants Herein and to Their Attorneys of Record Herein, and to All Other Persons Interested:

Notice is hereby given that the plaintiffs herein hereby appeal to the Supreme Court of the State of California from the judgment heretofore made and entered herein, and from the whole thereof, and from the order of the court heretofore made and entered herein which denied the motion of these plaintiffs that the judgment herein be set aside and vacated by the above entitled court and another and different judgment entered herein in favor of the plaintiffs and against the defendants, as pro-

vided in Section 663 of the Code of Civil Procedure of the State of California.

Dated October 2, 1947.

/s/ OLIVER O. CLARK,
/s/ ROBERT A. SMITH,
Attorneys for Plaintiffs.

[Endorsed]: Filed Oct. 2, 1947. [218]

Received copy of the within affidavit of John D. Gregg this 1st day of December, 1947.

OLIVER O. CLARK,
By /s/ M. BAILUS,
Attorney for Plaintiffs.

[Endorsed]: Filed Dec. 1, 1947. [219]

In the United States District Court, Southern District of California, Central Division

No. 7765—P. H.

HENRY WALLACE WINCHESTER, et al.,
Plaintiffs,

vs.

J. D. GREGG and the CITY OF LOS ANGELES, a municipal corporation,
Defendants.

AFFIDAVIT OF DONALD J. DUNNE IN OPPOSITION TO APPLICATION FOR PRELIMINARY INJUNCTION

State of California,
County of Los Angeles—ss.

Donald J. Dunne, being first duly sworn on oath, deposes and says:

That he is one of the attorneys of record for defendant John D. Gregg in the within action; that the land described in plaintiffs' Complaint in Equity herein as the "critical area" is the land in connection with which defendant has been granted by the City Council of the City of Los Angeles a Conditional Use Permit for the excavation of rock, sand and gravel and is the land which was involved in that certain action in the Superior Court of the State of California in and for the County of Los Angeles entitled "Jackson Earl Wheeler, et al., Plaintiffs, vs. J. D. Gregg, et al., Defendants," and numbered 522031; that in said Superior Court action Honorable Alfred L. Bartlett found that said Conditional Use Permit is valid, that the City Council of the City of Los Angeles in granting said Conditional Use Permit had not acted unfairly, arbitrarily or capriciously and judgment was entered against the plaintiffs and in favor of John D. Gregg denying an injunction prohibiting the excavation of rock, sand and [220] gravel from said land but setting forth four conditions which must be observed by defendant John D. Gregg in his operations, which conditions are in addition to the conditions set forth in the Conditional Use Permit; that a photostatic copy of the Complaint, the Answer of John D. Gregg, the Findings of Fact and Conclusions of Law, the Judgment and Notice of Appeal are attached to the affidavit of John D. Gregg filed concurrently herewith; that subsequent to the entry of judgment in said action the plaintiffs gave notice of appeal therefrom and are now actively prosecuting an appeal from said

judgment in the Supreme Court of the State of California and that the said appeal is still pending and has not been determined.

That as will appear from the affidavit of John D. Gregg filed concurrently herewith the land in the so-called "critical area" has no substantial value to defendant Gregg except for the production of rock, sand and gravel.

That it has long been established as the law of the State of California and by the decisions of the Supreme Court of the State of California and of other courts that the business of excavating rock and gravel by the owner from lands belonging to him is a lawful and useful occupation and cannot be prohibited by legislation; that in every reported case in California where governmental authority by legislation or ordinance has attempted to prohibit the excavation of rock, sand and gravel from land, the character of which made it useful for such purpose, such legislation or ordinances have been declared to be unconstitutional and invalid as the same applied to such lands; that such decision was made by the Supreme Court of the State of California in the cases of People vs. Hawley, 207 Cal. 395; In Re: Throop, 169 Cal. 93; In Re: Kelso, 147 Cal. 609;

That in two cases involving property in the vicinity of defendant's property the said rule of law has also been applied by the Superior Court of the State of California in and for the County of Los Angeles;

That the property of the Granite Materials Company lying a relatively short distance southerly of

defendant's and immediately adjacent to a new and growing residential district was some years ago zoned by the City of Los Angeles against the production of rock, sand and gravel, and an action was commenced in the Superior Court of the State of California in and for the County of [221] Los Angeles to enjoin the enforcement of said zoning in the case of DeHarpporte et al. vs. City of Los Angeles, No. 476337; that attached hereto marked Exhibit "A" and made a part hereof is a copy of the Judgment Roll in said case, wherein it was held that said ordinance was illegal and void as applied to said property;

That City Rock Company is the owner of rock land lying a relatively short distance northerly of defendant's property and that several years ago the City of Los Angeles zoned said property against the production of rock, sand and gravel and an action was commenced in the Superior Court of the State of California in and for the County of Los Angeles to enjoin the enforcement of said zoning in the case of Akmadzick vs. City of Los Angeles, No. 448415; that attached hereto marked Exhibit "B" and made a part hereof is a copy of the Judgment Roll in said case, wherein it was held that said ordinance was illegal and void as applied to said property;

That affiant alleges the foregoing for the purpose of demonstrating that defendant's right to excavate rock, sand and gravel from his said lands arises by virtue of defendant's ownership of said lands and the fact that said lands are adaptable only for the production of rock, sand and gravel

and said right does not primarily arise by virtue of any legislative action and that if legislative action should be such as to prohibit defendant from such operations that under the laws of the State of California defendant would be entitled to an injunction permanently prohibiting the interference by governmental authority in his operations for the production of rock, sand and gravel upon said lands; that affiant is informed and believes and therefore avers that had the City Council of the City of Los Angeles refused to grant defendant his Conditional Use Permit for the excavation of rock, sand and gravel upon said lands, that defendant under the facts of the instant case would have been entitled by reason of the foregoing to an injunction against the City of Los Angeles enjoining said City from interfering with his operations.

Affiant respectfully urges that based upon the facts alleged in the affidavit of John D. Gregg filed herein and by reason of the foregoing that the showing on the application for Preliminary Injunction is not sufficient to warrant the restraint sought and indicates that no material harm or loss will [222] be occasioned or suffered by plaintiffs during the interval before a decision can be had after trial and that no Preliminary Injunction should issue in the within action.

/s/ DONALD J. DUNNE.

Subscribed and sworn to before me this 28th day of November, 1947.

/s/ [Illegible]

Notary Public in and for said County and State.

EXHIBIT A

In the Superior Court of the State of California in and for the County of Los Angeles

No. 476337

L. F. DeHARPPORTE and CATHERINE E. DeHARPPORTE, Husband and Wife, and GRANITE MATERIALS COMPANY, a corporation,

Plaintiffs,

vs.

THE CITY OF LOS ANGELES,

Defendant.

Anderson & Anderson, 1112 Black Building, Los Angeles, California, Phone MUtual 1241, Attorneys for Plaintiffs.

COMPLAINT
DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs complain and allege:

I.

That the plaintiff, Granite Materials Company, is now, and at all of the times herein mentioned has been, a corporation, organized and existing under and by virtue of the laws of the State of California, and having its office and principal place of business in the County of Los Angeles, State of California, and organized and empowered to acquire, own and operate real property for any and all legitimate and legal purposes, and particu-

larly for the development of rock crushing purposes, and for the handling, crushing and processing of such rock, and all business activities incident to, or connected therewith; and that the defendant, The City of Los Angeles, is, and at all of the times mentioned herein [224] has been, a duly and legally chartered city of the State of California, located in the County of Los Angeles, State of California.

II.

That the plaintiffs, L. F. DeHarpporte and Catherine E. DeHarpporte, are, and at all of the times herein mentioned have been, the owners, as joint tenants, in fee simple absolute, of that certain real property in the City of Los Angeles, County of Los Angeles, State of California, and in that portion of the said City of Los Angeles included in what is known as the San Fernando Valley, which said real property is more particularly described as follows, to-wit:

> Block 325, as per Miscellaneous Records Book 37, pages 5 to 16, of the Records of Los Angeles County, California;

That said Block 325 contains approximately 40 acres.

III.

That the plaintiffs, L. F. DeHarpporte and Catherine E. DeHarpporte, hereinafter referred to as the "individual plaintiffs," have heretofore, for a valuable consideration, given to the plaintiff, Granite Materials Company, an option in writing, which

is still in full force and effect, to purchase said Block 325 above referred to, save and except that portion of said property fronting on Wicks Avenue, starting at Sharp Street and extending Southwesterly along Wicks Avenue to within 100 feet of Arleta Street, with a uniform depth of 150 feet, it being the purpose and intent of the plaintiff, Granite Materials Company, to purchase and acquire said property wholly and solely because of, and by reason of its value for rock development and rock crushing purposes, including excavation for rock, sand and gravel, and business activities connected with and incident to such rock development and rock crushing purposes; and it is the purpose and intent of said Granite Materials Company to exercise said option to purchase [225] said property if, only, and when the same can legally be used for such rock development and rock crushing purposes and such business activities connected with and incident thereto, and the business of rock development and rock crushing and other such allied business activities can be legally conducted and carried on upon said property; and that by virtue of the foregoing facts, the plaintiff, Granite Materials Company, has an interest in said property and in the subject matter of this action.

IV.

That said property, and the whole thereof, is wholly unfitted for, and has no appreciable value for any purpose, or purposes, other than the use

thereof for the business of rock development and rock crushing purposes, including excavation for rock, sand and gravel, and other allied businesses to be carried on in connection therewith, but that said, and the whole of said property is particularly and especially fitted for, and has a reasonably large value for such rock development and rock crushing purposes, and such other allied business to be carried on in connection therewith, and has no appreciable value whatever for any other purpose, or purposes, and is particularly unfit for any other kind of business, and has little, if any, value whatever for residence purposes, and the far greater portion thereof is wholly unfit for any kind or character of residence purposes whatsoever.

V.

That on or about February 16, 1916, the defendant, by and through its lawfully empowered legislative body, adopted an ordinance which became effective on or about March 19, 1916, known as Ordinance No. 33761 (New Series) of said City, and which purported to establish the entire City of Los Angeles, with certain exceptions, which exceptions did not include or affect said real property hereinbefore described, as a residence district.

That in and by said last mentioned Ordinance, defendant [226] purported to prohibit the establishment or maintenance in the said residence district of any and all business, commercial and/or industrial activities not specifically permitted in the

said Ordinance. That because of the exceptions in said Ordinance contained, no part of the land aforesaid was included within said residence district until said Ordinance was amended, as hereinafter alleged.

VI.

That thereafter defendant adopted an Ordinance which became effective on or about August 29, 1925, as Ordinance No. 52421, which amended Ordinance No. 33761 (New Series) by including within the residence district established by said Ordinance and making subject to the prohibitions thereof a certain area known as the Hansen Heights Addition, which said area included the property of plaintiff Company hereinabove described.

VII.

That thereafter defendant adopted an Ordinance which became effective on or about September 26, 1934, as Ordinance No. 74140 (New Series) which said Ordinance superseded and took the place of Ordinance No. 33761 (New Series), hereinabove mentioned as amended, and said Ordinance No. 74140 is now, and at all times from and after September 26, 1934, has been, in full force and effect as the residence district ordinance of the defendant City, and that the prohibitions contained in the said Ordinance purport to prohibit the establishment or maintenance upon the real property of the individual plaintiffs hereinabove described of any business, commercial or industrial activity save and except as specifically permitted by said Ordinance No. 74140.

VIII.

That by virtue of the aforementioned facts and the terms and provisions of the ordinance herein mentioned, the use and occupation of the real property hereinbefore described for the [227] business of rock development and rock crushing, excavating sand and gravel, and any and all businesses and business activities incidental thereto and connected therewith, will constitute a nominal and seeming violation of the terms and conditions of said ordinance, and seemingly would subject the owners of said property to penalties for such apparent and seeming violation.

IX.

That it is the attitude and opinion of the City Attorney of the defendant, and of the defendant itself, that property of the kind, class and character of the property hereinbefore described, and located and situated as such property hereinbefore described is located and situated, may and can no longer be used for the purposes described in paragraph IV hereof as the purposes to which it is best suited and adapted, and the Planning Commission of the defendant, when requested so to do by the owners of said property hereinbefore described, refused to re-zone the same so that it could be used for any of such purposes, or for any purpose, or purposes, other than residence purposes, or other than as nominally permitted by such ordinances.

X.

That a dispute and controversy now exists by and between plaintiffs and defendant with respect to the interpretation of the ordinances above mentioned, and the application of said ordinances to the property hereinbefore described, as follows, to-wit:

(a) That defendant contends that the said property may not legally be used, nor any part of the same may legally be used, for those purposes, activities and uses designated in paragraph IV hereof, and the uses and purposes to which it is best adapted;

(b) That plaintiff company contends that the said properties, and the whole thereof, may be used for said purposes.

XI.

That it is material and essential to the preservation of [228] the individual plaintiffs' property rights in and to said property, and to its full free enjoyment of its proper rights and privileges as the owner thereof, that a declaratory judgment be entered herein settling and determining the said controversy between plaintiffs and defendant hereinabove described, and that by reason of the foregoing facts plaintiff company has neither a plain, speedy and adequate remedy at law, nor any remedy at law whatsoever.

And for Another, and Further, and Separate Cause of Action, and as a Second, Separate and Distinct Cause of Action, plaintiffs allege as follows:

I.

Plaintiffs incorporate herein, and adopt and make a part hereof, the same as if herein set forth at length, Paragraphs I, II, III, IV, V, VI, VII, VIII, IX and XI of their foregoing first cause of action.

II.

That a dispute and controversy now exists by and between plaintiffs and defendant with respect to the interpretation of the ordinances above mentioned, and the application of said ordinances to the property herein described, and particularly with reference to subdivision (h) of Section 16.04 of the Los Angeles Municipal Code Ordinance 77000, being a codification of Ordinance 74140 hereinabove mentioned, which said controversy and dispute is as follows:

(a) That defendant contends that by reason of the terms and conditions of said subdivision (h) of said Section 16.04, the plaintiffs' rights to conduct on the hereinabove described property those activities and uses hereinabove mentioned in paragraph IV of the first cause of action hereof have been lost.

(b) Plaintiffs contend that the said property may be used for the purposes, activities and uses

described in paragraph IV [229] of the first cause of action hereof, and that the rights so to do have not been lost, by reason and because of the fact that the aforementioned subdivision (h) of said Section 16.04 was, and is, unconstitutional and void insofar as the same is applicable to the property herein described, in that the said ordinance as applied to the said property is unjust, unreasonable, arbitrary and confiscatory, and, if enforced, would deprive the plaintiffs of their property and property rights without due process of law.

And for Another, and Further, and Separate Cause of Action, and as a Third, Separate and Distinct Cause of Action, plaintiffs allege as follows:

I.

Plaintiffs incorporate herein, and adopt and make a part hereof, the same as if herein set forth at length, Paragraphs I, II, III, IV, V, VI, VII, VIII, IX and XI of their foregoing first cause of action.

II.

That the property hereinabove described was, and is, of a type peculiarly suited for the purposes of excavating for rock, sand and gravel, and for carrying on the rock, sand and gravel business as described in paragraph IV of the first cause of action hereof, and that the said property is not suitable or valuable for any other use or purpose whatsoever. Plaintiffs further allege that unless the said property is used and employed for the purposes

above mentioned, the same is, and will be, of no value whatsoever to plaintiffs, or to either or any of them, and that if the said property is, and may be, used for the purposes hereinabove mentioned, the same will be of great value to plaintiffs, and to each and all of them.

III.

That a dispute and controversy now exists by and between [230] plaintiffs and defendant with respect to the interpretation of the Ordinances above mentioned, and the application of said Ordinances to the property hereinabove described, which said controversy and dispute is as follows:

(a) That defendant contends that the above mentioned Ordinances can, and do, prohbit plaintiffs, and each and all of them, from carrying out on the above described premises those activities and uses hereinabove mentioned in paragraph IV of the first cause of action hereof.

(b) Plaintiffs contend that the said Ordinances do not, and cannot, prohibit the use and employment of the said property for the purposes, uses and activities described in paragraph IV of the first cause of action hereof, by reason of the fact that the said Ordinances, if so applied and interpreted, were, and are, unjust, unreasonable, arbitrary and confiscatory, and would thereby render the said property described herein, and the whole thereof, of no value whatsoever, and deprive the individual plaintiffs of the said property without due process of law.

And for Another, and Further, and Separate Cause of Action, and as a Fourth, Separate and Distinct Cause of Action, plaintiffs allege as follows:

I.

Plaintiffs incorporate herein, and adopt and make a part hereof, the same as if herein set forth at length, Paragraphs I, II, III, IV, V, VI, VII, VIII, IX and XI of their foregoing first cause of action.

II.

That a dispute and controversy now exists by and between plaintiffs and defendant with respect to the interpretation of the Ordinances above mentioned, and the application of said Ordinances to the property hereinabove described, and particularly with [231] reference to subdivision (g) of Section 16.04 of the Los Angeles Municipal Code Ordinance 77000, being a codification of Ordinance 74140 hereinabove mentioned, which said controversy and dispute is as follows:

(a) Defendant contends that notwithstanding the terms and conditions of said subdivision (g) of said Section 16.04, the plaintiffs may not use any of the property hereinabove mentioned for the uses, purposes and activities mentioned in paragraph IV of the first cause of action herein.

(b) Plaintiffs contend that under and by virtue of the terms and provisions of said subdivision (g) of said Section 16.04, the property,

and the whole thereof, herein described may be used for the uses, purposes and activities described in paragraph IV of the first cause of action herein.

Wherefore, plaintiffs pray judgment as follows:

First: That a declaratory judgment be made and entered that plaintiffs are lawfully entitled to occupy and use the property described in Paragraph II of the first cause of action of the within complaint for those objects, uses, purposes and activities described in Paragraph IV of the within complaint.

Second: That a declaratory judgment be made and entered that subdivision (h) of Section 16.04 of the Los Angeles Municipal Code Ordinance No. 77000 was, and is, unconstitutional and void as applied to the property of the plaintiffs hereinabove mentioned.

Third: That a declaratory judgment be made and entered that each and every subdivision of Chapter I, Article 6, of Ordinance No. 77000 of the City of Los Angeles, being otherwise known as the Residence District Ordinance and as a codification of Ordinance No. 74140 of the said City, be, and the same is, unconstitutional and void as applied to the property of the plaintiffs hereinabove mentioned.

Fourth: That the defendant be permanently enjoined and [232] restrained from interfering with

plaintiffs' proper use and enjoyment of the property of plaintiff company in the manner hereinabove described.

Fifth: For their costs of suit in this action incurred; and,

Sixth: For such other and further general relief as the court may deem to be just, right and equitable.

ANDERSON & ANDERSON,
By /s/ W. H. ANDERSON,
Attorneys for Plaintiff [233]

State of California,
County of Los Angeles—ss.

L. F. DeHarpporte, being by me first duly sworn, deposes and says that he is one of the plaintiffs in the above entitled action; that he has read the foregoing Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ L. F. DeHARPPORTE.

Subscribed and sworn to before me this 7th day of May, 1942.

[Seal] /s/ TRENT G. ANDERSON.

Notary Public in and for the County of Los Angeles, State of California. [234]

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 476,337

L. F. DeHARPPORTE and CATHERINE E. DeHARPPORTE, Husband and Wife, and GRANITE MATERIALS COMPANY, a corporation,

Plaintiffs,

vs.

THE CITY OF LOS ANGELES, a municipal corporation,

Defendant.

Anderson & Anderson, 1112 Black Building, Los Angeles, California, Phone MUtual 1241, Attorneys for Plaintiffs.

AMENDED AND SUPPLEMENTAL COMPLAINT—INJUNCTIVE RELIEF

Now comes the plaintiffs, and amending and supplementing their complaint heretofore filed herein, complain and allege:

I.

That the plaintiff, Granite Materials Company, is now, and for several years last past has been, a corporation, organized and existing under and by virtue of the laws of the State of California, and having its office and principal place of business in the County of Los Angeles, State of California,

and authorized and empowered to acquire, own and operate real property for any and all legitimate and legal purposes, and particularly for the development of rock crushing purposes, and for the handling, crushing and processing of such rock, and all business activities incident to, or connected [235] therewith; and that the defendant, The City of Los Angeles, is, and at all of the times mentioned herein has been, a duly and legally chartered municipal corporation, to-wit, a city of the State of California, located in the County of Los Angeles, State of California.

II.

That the plaintiffs, L. F. DeHarpporte and Catherine E. DeHarpporte, are the owners, as joint tenants in fee simple absolute, of that certain real property in the City of Los Angeles, County of Los Angeles, State of California, and in that portion of the said City of Los Angeles included in what is known as the San Fernando Valley, which said real property is more particularly described as follows, to-wit:

> Block 325 of the Maclay Rancho Ex Mission San Fernando, as per map recorded in Book 37, pages 5 to 16, Miscellaneous Records of Los Angeles County, California;

that said Block 325 is hereinafter referred to as Parcel One.

That the plaintiffs, L. F. DeHarpporte and Catherine E. DeHarpporte have, since the filing of the complaint herein, become the owners, as

joint tenants, in fee simple absolute, of that certain real property in the City of Los Angeles, County of Los Angeles, State of California, and in that portion of the said City of Los Angeles included in what is known as the San Fernando Valley, which said real property is more particularly described as follows, to-wit:

> Block 340 of the said Maclay Rancho Ex Mission San Fernando, as per map recorded in Book 37, pages 5 to 16, Miscellaneous Records of Los Angeles County, California;

that said Block 340 is hereinafter referred to as Parcel Two.

That said Parcels One and Two are contiguous.

III.

That the plaintiffs, L. F. DeHarpporte and Catherine E. DeHarpporte, [236] hereinafter referred to as the "individual plaintiffs," have heretofore, for a valuable consideration, given to the plaintiff, Granite Materials Company, an option in writing, which is still in full force and effect, to purchase said Block 325 above referred to, Parcel One herein, save and except that portion of said block fronting on Wicks Avenue, starting at Sharp Street and extending Southwesterly along Wicks Avenue to within 100 feet of Arleta Street, with a uniform depth of 150 feet; and said plaintiffs have, since the filing of the complaint herein, for a valuable consideration, given to the plaintiff, Granite Materials Company, an option in writing.

which is still in full force and effect, to purchase said Block 340, Parcel Two herein, it being the purpose and intent of the plaintiff, Granite Materials Company, to purchase and acquire said Parcels One and Two wholly and solely because of, and by reason of their value for rock development and rock crushing purposes, including excavation for rock, sand and gravel, and business activities connected with and incident to such rock development and rock crushing purposes; and it is the purpose and intent of said Granite Materials Company to exercise said options to purchase said property if, only, and when the same can legally be used for such rock development and rock crushing purposes and such business activities connected with and incident thereto, and the business of rock development and rock crushing and other such allied business activities can be legally conducted and carried on upon said property without interference, let or hindrance by defendant as hereinafter alleged to be threatened by defendant; and that by virtue of the foregoing facts, the plaintiff, Granite Materials Company, has an interest in said property and in the subject matter of this action.

IV.

That said property, and the whole thereof, is practically unfitted for, and has no appreciable value for any purpose, or [237] purposes, other than the use thereof for the business of rock development and rock crushing purposes, including excavation for rock, sand and gravel, and other allied businesses to be carried on in connection

therewith, but that said, and the whole of said property is particularly and especially fitted for, and has a reasonably large value for such rock development and rock crushing purposes, and such other allied business to be carried on in connection therewith, and has no appreciable value whatever for any other purpose, or purposes, and is particularly unfit for any other kind of business, and has little, if any, value whatever for residence purposes, and the far greater portion thereof is wholly unfit for any kind or character of residence purposes whatsoever.

V.

That by the provisions of Ordinance No. 33,761 (New Series), adopted March 19, 1916, the real property described in Paragraph II hereof was zoned for residential purposes, and the use of said property for the purpose of constructing, operating, or maintaining a rock crushing plant thereon was prohibited; that by the provisions of Ordinance No. 74,140, adopted September 26, 1934, said Ordinance No. 33,761 was re-published and reenacted, and the real property, described in Paragraph II hereof, was again classified as residential property in the same manner after the same had been classified as residential property under Ordinance No. 33,761; that on or about the 28th day of September, 1936, the City of Los Angeles adopted Los Angeles Municipal Code, which is numbered No. 77,000. By the terms of said ordinance, Ordinance No. 74,140 was incorporated into the provisions of the Los Angeles Municipal Code in Article 6 of Chapter 1 thereof;

That by reason thereof the defendant threatens and intends to and will, unless restrained and enjoined by this Court, compel the owner or owners thereof to restrict its use wholly and solely to residential purposes and uses only, and threatens and intends [238] to and will, unless so restrained and enjoined, interfere with and prevent its use for any other purpose or purposes, and particularly to prevent its use for the said only uses and purposes for which, as above alleged, it is particularly and practically fitted, and for which alone it has any particular or appreciable value whatever, to-wit, the uses and purposes alleged and described in Paragraph IV hereof.

That said claim of defendant is wholly without any legal right whatsoever, and if said claim is enforced as so threatened by said defendant, it will deprive said property of all reasonable value, and will deprive the plaintiffs of all appreciable value of said property and the whole thereof, and will deprive them of its said proper and valuable use without due process of law in violation of the provisions of the Constitution of the United States, and particularly of Section 1, of Article XIV of said Constitution, and in violation of the provisions of the Constitution of the State of California.

VI.

That it is the attitude and opinion of the City Attorney of the defendant, and of the defendant itself, that property of the kind, class and character of the property hereinbefore described, and located and situated as such property hereinbefore

described is located and situated, may and can no longer be used for the purposes described in paragraph IV hereof as the purposes to which it is best suited and adapted, and the Planning Commission of the defendant, when requested so to do by the owners of said Parcel One hereinbefore described, refused to re-zone the same so that it could be used for any of such purposes, or for any purpose, or purposes, other than residence purposes.

VII.

That plaintiffs have no plain, speedy or adequate remedy at law. [239]

Wherefore, plaintiffs pray judgment as follows:

First: That the defendant, The City of Los Angeles, be permanently enjoined and restrained from enforcing the provisions of said Article 6, Chapter 1, of the Los Angeles Municipal Code against the real property hereinabove described as Parcels 1 and 2, insofar as said Article 6, Chapter 1, of the Los Angeles Municipal Code prohibits the use of said real property for the purposes of constructing, operating or maintaining a rock crushing or sand and gravel plant on said property, or any part thereof, or prohibits the use of said real property for excavating rock, sand or gravel from said real property, or any part thereof, including other incidental businesses to be carried on in connection therewith;

Second: For their costs of suit in this action incurred; and,

Third: For such other and further general relief as the Court may deem to be just, right and squitable.

ANDERSON & ANDERSON,
By /s/ TRENT G. ANDERSON,
Attorneysf or Plaintiffs.

[Endorsed]: Filed July 3, 1942. [240]

In the Superior Court of the State of California, in and for the County of Los Angeles.

No. 476-337. Dept. 20.

L. F. DeHARPPORTE and CATHERINE E. DeHARPPORTE, Husband and Wife, and GRANITE MATERIALS COMPANY, a Corporation,

Plaintiffs,

vs.

THE CITY OF LOS ANGELES, a municipal corporation,

Defendant.

Anderson & Anderson, 1112 Black Building, Los Angeles, California, Mutual 1241, Attorneys for Plaintiffs.

Hon. Thomas C. Gould, Presiding.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitle cause came on regularly for trial on the 8th day of October, 1942, before the Court sitting without a jury, Messrs. Anderson &

Anderson appearing as attorneys on behalf of plaintiffs, and Ray L. Chesebro, City Attorney, and Clyde F. Harrell, Jr., Deputy City Attorney, appearing for and on behalf of the defendant, and evidence, both oral and documentary, having been introduced and the cause submitted for decision, the Court now makes its Findings of Fact as follows:

Findings of Fact

First: That all the allegations of plaintiffs' amended and supplemental complaint are true.

Second: That none of the allegations of defendant's answer to said amended and supplemental complaint, except insofar as such [241] allegations constitute and are admissions of the allegations of the plaintiffs' amended and supplemental complaint, is true.

Conclusions of Law

And as Conclusions of Law from the foregoing facts the Court finds that the plaintiffs are entitled to judgment as follows, to-wit:

First: That the defendant, The City of Los Angeles, be permanently enjoined and restrained from enforcing the provisions of Article 6, Chapter 1, of the Los Angeles Municipal Code, referred to in said amended and supplemental complaint, against the real property described in said amended and supplemental complaint as Parcels One and Two, insofar as said Article 6, Chapter 1, of the Los Angeles Municipal Code prohibits the use of said real property for the purposes of constructing, operating or maintaining a rock crushing plant, or sand

and gravel plant on said propety, or any part thereof, or prohibits the use of said real property for excavating rock, sand or gravel from said real property, or any part thereof, including other incidental businesses to be carried on in connection therewith.

Second: That the plaintiffs recover their costs of suit in this action incurred.

Let judgment be entered accordingly.

Dated: Octobed 16th, 1947.

/s/ THOMAS C. GOULD,
Judge.

State of California,
County of Los Angeles—ss.

L. F. DeHarpporte, being by me first duly sworn, deposes and says: that he is one of the plaintiffs in the above entitled action; that he has read the foregoing Amended and Supplemental Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ L. F. DeHARPPORTE.

Subscribed and sworn to before me this 25th day of June, 1942.

[Seal] /s/ TRENT G. ANDERSON,
Notary Public in and for the County of Los Angeles, State of Califfornia.

[Endorsed]: Filed Oct. 16, 1942. [243]

In the Superior Court of the State of California, in and for the County of Los Angeles.

No. 476-337. Dept. 20.

L. F. DeHARPPORTE and CATHERINE E. DeHARPPORTE, Husband and Wife, and GRANITE MATERIALS COMPANY, a Corporation,

Plaintiffs,

vs.

THE CITY OF LOS ANGELES, a municipal corporation,

Defendant.

Anderson & Anderson, 1112 Black Building, Los Angeles, California, Mutual 1241, Attorneys for Plaintiffs.

Hon. Thomas C. Gould, Presiding.

JUDGMENT

The above entitled cause came on regularly for trial on the 8th day of October, 1942, before the Court sitting without a jury, Messrs. Anderson & Anderson appearing as attorneys for plaintiffs, and Hon. Ray L. Chesebro, City Attorney, and Clyde F. Harrell, Jr., Deputy City Attorney, appearing for the defendant, and evidence, both oral and documentary, having been introduced and the cause submitted for decision, and the Court having made its Findings of Fact and Conclusions of Law, and ordered judgment accordingly;

Now, Therefore, in conformity with said Findings of Fact and said Conclusions of Law consti-

tuting the decision of the Court in said action, It Is Hereby Ordered, Adjudged and Decreed as [214] follows, to-wit:

First: That the defendant, The City of Los Angeles, be, and it is hereby, permanently enjoined and restrained from enforcing the provisions of Article 6, Chapter 1, of the Los Angeles Muncipal Code, referred to in the amended and supplemental complaint in this action, against the real property described as Parcels One and Two in said amended and supplemental complaint of plaintiffs, insofar as said Article 6, Chapter 1, of the Los Angeles Municipal Code prohibits the use of said real property for the purposes of construting, operating or maintaining a rock crushing plant, or sand and gravel plant on said property, or any part thereof, or prohibits the use of said real property for excavating rock, sand or gravel from said real property, or any part thereof, including other incidental businesses to be carried on in connection therewith, all of said real property being located in that portion of the said City of Los Angeles included in what is known as the San Fernando Valley, which said real property is more particularly described as follows, to-wit:

Parcel One: Block 325 of the Maclay Rancho Ex Mission San Fernando, as per map recorded in Book 37, pages 5 to 16, Miscellaneous Records of Los Angeles County, California;

Parcel Two: Block 340 of the said Maclay Rancho Ex Mission San Fernando, as per map

recorded in Book 37, pages 5 to 16, Miscellaneous Records of Los Angeles County, California.

Second: That the plaintiffs have and recover of the defendant their costs of suit in this action incurred, taxed at $.....

Dated: October 16th, 1942.

/s/ THOMAS C. GOULD,
Judge.

[Endorsed]: Filed Oct. 16, 1942. [245]

EXHIBIT B

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 448415

PETER J. AKMADZICH and MARY LOUISE AKMADZICH,

Plaintiffs,

vs.

CITY OF LOS ANGELES, a municipal corporation, ARTHUR C. HOHMAN, as Chief of Police of the City of Los Angeles, RAY L. CHESEBRO, as City Attorney of the City of Los Angeles, ONE DOE, TWO DOE, THREE DOE, FOUR DOE, FIVE DOE, SIX DOE, SEVEN DOE, EIGHT DOE, NINE DOE and TEN DOE,

Defendants.

COMPLAINT FOR INJUNCTIVE RELIEF

Now comes the plaintiffs and for cause of action allege:

I.

Plaintiffs are now and were at all times herein mentioned, husband and wife.

Defendant City of Los Angeles is now and was at all times herein mentioned, a municipal corporation and political subdivision of the State of California.

Defendant Arthur C. Hohmann is the duly appointed, qualified and acting Chief of Police of the City of Los Angeles.

Defendant Ray L. Chesebro is the duly elected, qualified and acting City Attorney of the City of Los Angeles.

Defendants One Doe to Ten Doe, inclusive, are agents, [246] servants, employees and officers of the City of Los Angeles. The true names of said defendants are unknown to plaintiffs, but plaintiffs, upon ascertaining the true names of such defendants, will amend their complaint by inserting the true names of defendants aforesaid, herein.

II.

That defendant Arthur C. Hohmann, as Chief of Police of the City of Los Angeles, is the law enforcement and principal peace officer of said City.

Defendant Ray L. Chesebro, as the City Attorney of the City of Los Angeles, is charged with the duty and responsibility under the charter of the City of Los Angeles, of prosecuting violations of ordinances and purported ordinances of said City.

III.

Plaintiffs are the owners of certain real property situated in the City of Los Angeles, County of Los Angeles, State of California, described as follows, to wit:

> Lots 1, 2, 21 and 22, Tract No. 999, as per Map recorded in Book 16, Pages 166 and 167 of Maps, Records of Los Angeles County, State of California;
>
> Also, Lots 1 and 2, Tract No. 10958, as per Maps recorded in Book 198, Pages 8, 9 and 10 of Maps, records of said County, excepting therefrom any portion of the above lots lying within the boundary of any public street.

Said property embraces an area of approximately fifty-four acres.

Plaintiffs acquired the portion of said property formerly described as Lots 19 and 20, Tract 999 in the County of Los Angeles, State of California, hereinafter more particular referred to, on or about the 15th day of August, 1934, and acquired the remainder of said property from time to time subsequent thereto, and prior to February 27, 1936.

IV.

That at the time plaintiffs acquired former Lots 19 and 20, of Tract 999, there was situated thereon machinery and equipment for excavating and crushing rock, commonly known as a rock crushing plant; that thereafter plaintiff Peter J. Akmadzich operated said property as a rock crushing plant,

and from time to time constructed additional machinery and equipment for such purpose, and improved the existing machinery and equipment; that on or about the month of March, 1937, the said Peter J. Akmadzich found that he could not operate the said rock crushing plant at a profit, without also operating in conjunction therewith a hot mix asphalt plant for the production of asphalt for street paving purposes; that by reason thereof, on or about the 22nd day of March, 1937, the said Peter J. Akmadzich constructed on the area which constituted former Lots 19 and 20 of Tract 999, a hot mix asphalt plant, and thereafter and until the present time, has operated the said rock crushing plant and hot mix asphalt plant conjunctively as a single business enterprise; that the said Peter J. Akmadzich has invested in the improvement and development of said property for the purposes of operating said rock crushing plant and said hot mix asphalt plant, between the dates of August 15, 1934, and the present time, the sum of approximately $175,000, and that the said real property, consisting of approximately fifty-four acres, hereinbefore described, together with the improvements thereon, has a market value of $250,000 if the said property be operated as a rock crushing and hot mix asphalt plant.

V.

That all of the machinery and equipment on said property for crushing rock and for mixing hot asphalt, commonly referred to as the rock crushing machinery, and the hot mix asphalt machinery, is

located within the area of approximately ten acres formerly described as Lots 19 and 20 of Tract 999, hereinbefore referred to, [248] and that the remainder of said property is being used for the purposes only of excavating rock therefrom.

VI.

That the said property is located in the bed of the Tujunga Wash and immediately adjacent to the channel through which the water of the Tujunga Wash flow, and that said property is subject to flooding and overflow, at periods of heavy rainfall; that the said rock crushing and hot mix asphalt plant is located approximately 1500 feet distance from the nearest dwelling or place of human habitation; that the rock and gravel underlying all of the plaintiffs' property, and which is being excavated, mined and distributed by the plaintiff Peter J. Akmadzich from said property is extraordinary in desirable quality, character and texture, and that said rock and gravel is the only rock and gravel found or produced in the City of Los Angeles or immediately adjacent thereto, that complies with the standard specifications for road building materials adopted and maintained by the State Highway Department of the State of California.

That the property of the plaintiffs is so located that a rock crushing and hot mix asphalt plant can be operated on said premises with less inconvenience or annoyance to residents of the City of Los Angeles or to the general public than at any other place within the City of Los Angeles where rock deposits are to be found.

VII.

That the said property of the plaintiffs is of no value whatever for residence purposes, and in fact is positively unfit for residence purposes by reason of the liability and menace of flooding and overflow as hereinbefore alleged, and that for such reason it would be unsafe to construct a residence or dwelling house upon such property; that the said property is valueless for agricultural purposes or for any other purpose except for the [249] purposes for which said property is being utilized as hereinbefore alleged.

That the plaintiff Peter J. Akmadzich has developed a large and profitable business upon said property through the efficient, skillful and scientific operation and maintenance of said rock crushing plant and said hot mix asphalt plant, and that it would be impossible to operate the said property at a profit, if the operation were confined to the rock crushing plant and the area of excavation were confined to the area of former Lots 19 and 20 of Tract 999 hereinbefore referred to.

VIII.

That on or about the 16th day of February, 1916, the City of Los Angeles adopted an Ordinance commonly known and designated as Ordinance No. 33761 (N.S.) under and by virtue of the terms of which the entire area of the City of Los Angeles with the exception of certain districts designated therein, was restricted to use for residential purposes; that at the time of the adoption of the said

Ordinance, the property now owned by the plaintiffs as hereinbefore alleged, was not included within the limits of the City of Los Angeles, but that thereafter, on or about the 11th day of of April, 1918, an area was annexed to the City of Los Angeles, including the said property of plaintiffs; that on or about the 29th day of August, 1925, Ordinance 52421 was adopted by the City of Los Angeles amending said Ordinance No. 33761 (N.S.) under and by virtue of the terms of which the provisions of said Ordinance No. 33761 (N.S.) were extended to the property so annexed to the City of Los Angeles, and the area occupied by the property of the plaintiffs was included within the district in said City of Los Angeles restricted to residential use; that thereafter, to wit, on or about August 28, 1931, the City of Los Angeles adopted an Ordinance commonly known as Ordinance No. 70210 under and by virtue of the terms of which it was provided that Lots 19 and 20 of Tract No. [250] 999, as per Map recorded in Book 16, Pages 166 and 167 of Maps, Records of Los Angeles County, should be excepted from the residence district of the City of Los Angeles; that said Lots 19 and 20 referred to, described an area of approximately ten acres, which was subsequently included in and constitutes the Westerly portion of Lot 1 of Tract No. 10958 hereinbefore described.

That thereafter, to wit, on or about September 21, 1934, the City of Los Angeles adopted an Ordinance commonly known as Ordinance No. 74140, which Ordinance contained various provisions re-

stricting the use of property in various localities in the City of Los Angeles, and among other things, contained the following provision:

> "(d) For the purpose of this Article, each of those separate portions of the City which prior to the effective date of Ordinance 74140 had been excepted from the Residence District by ordinance adopted by the Council, shall be considered as having been granted a variance from the provisions of this Article but only so far as such variance is necessary to permit the use of the lot or premises involved for the particular purpose for which the original exception was granted as shown by the records of the case on file with the Board or with the City Clerk."

That thereafter, to wit, on or about the 12th day of November, 1936, the City of Los Angeles adopted an ordinance commonly known as No. 77,000 and also commonly known and officially designated as the Los Angeles Muncipal Code; that the said Ordinance constituted a re-enactment and codification of a large number of previously enacted ordinances in said City, and among other things, re-enacted the provisions of Ordinance No. 33761 (N.S.) as amended as hereinbefore alleged, and the provisions of Ordinance No. 70210 and the provisions of Ordinance No. 74140 as hereinbefore alleged.

That said Ordinance No. 77,000 contains provisions to the effect that all of the property of the

plaintiffs with the exception of the area embraced in former Lots 19 and 20 of Tract 999, shall be used for residential purposes only, and for no other purpose.

IX.

That the defendants claim, contend and assert in connection with Ordinance No. 70210 that the records relating thereto on file with the Department of City Planning and with the City Clerk of the City of Los Angeles, indicate and show that the exception granted by said Ordinance was granted to permit the use of the property therein described, to wit, former Lots 19 and 20 of Tract 999 for the purpose of operating a wet process rock crushing plant only, and for no other purpose, and the defendants further claim, contend and assert that under the provisions of said Ordinances hereinbefore referred to, the plaintiffs are prohibited from operating said hot mix asphalt plant and from excavating rock outside of the area of said former Lots 19 and 20 of Tract 999, and are prohibited from using their said property outside of said area for any purpose except for residential purposes.

That as hereinbefore alleged, the rock crushing plant hereinbefore referred to, cannot be operated at a profit except in conjunction with the hot mix asphalt plant, and then only if the excavation of rock from the property of the plaintiffs outside of the area of said former Lots 19 and 20, Tract 999 be permitted.

X.

That none of the property of the plaintiffs has any value whatever for any other use except for the purpose of excavating rock and operating said rock crushing plant and hot mix asphalt [252] plant in conjunction therewith, and that if such uses of the property be prohibited, it will completely destroy the value of plaintiff's property and result in the confiscation thereof.

XI.

That numerous other rock crushing plants and hot mix asphalt plants exist and are being operated within the city limits of the City of Los Angeles, and that as to each of said plants there is less reason or justification for permitting the operation of such plants than there is for permitting the operation of rock crushing plant and hot mix asphalt plant hereinbefore referred to, and that as to each of such plants, there is less reason and justification for permitting the excavation of rock than upon the property of the plaintiffs hereinbefore described; that none of said plants is so remotely situated from places of human habitation and residential districts as the property of the plaintiffs in this action; that with respect to many of said plants, there are numerous residences and places of habitation surrounding the said plants, and within a distance of from 500 to 1,000 feet thereof, and that some of said plants are entirely surrounded by a closely built residential district, and that the land upon which most of said plants

are situated could safely be used for and is adaptable to the construction and maintenance of residences for human habitation; that with reference to said plants, the City of Los Angeles in each instance has adopted an Ordinance or Ordinances permitting the operation of said plants.

XII.

Plaintiffs have endeavored to secure the adoption by the city authorities of the City of Los Angeles of an Ordinance permitting the operation of the said rock crushing plant and hot mix asphalt plant and the conduct of said excavation on the property of the plaintiffs, and the officials of the City of Los Angeles have refused to adopt such Ordinance, and have [253] refused to grant permission to the plaintiffs to continue the said operations hereinbefore alleged.

XIII.

That the Ordinances hereinbefore referred to, insofar as they purport to prohibit the operation of said rock crushing plant and of said hot mix asphalt plant and the conduct of said excavation on the property of the plaintiffs, are void and unenforceable for the following reasons:

1st: The said Ordinances, if enforced, will confiscate the property of the plaintiffs;

2nd: The Ordinances aforesaid are unreasonable, arbitrary and oppressive;

3rd: The said Ordinances are discriminatory in that other rock crushing plants and hot mix asphalt plants in the City of Los Angeles are permitted to be operated under more objectionable circumstances than the circumstances surrounding the property of the plaintiffs;

4th: The provisions of said Ordinances in their operation upon the property of the plaintiffs, violate the provisions of Section 13, Article I of the Constitution of the State of California;

5th: That the provisions of said Ordinances in their operation upon the property of the plaintiffs, violate the provisions of Section 14, Article I of the Constitution of the State of California;

6th: That the provisions of said Ordinances in their operation upon the property of the plaintiffs, violate the provisions of [254] Section 1 of the Fourteenth Amendment to the Constitution of the United States;

8th: That the provisions of said Ordinances and their operation upon the property of the plaintiffs, violate the provisions of the Fifth Amendment to the Constitution of the United States.

XIV.

That the present conduct and operation of plaintiffs' business or the future operation thereof in

the present location, will not tend to, and will not, endanger or impair either the health, safety, morals, convenience, comfort or welfare of the general public, and does not and will not interfere with the use and occupation of the dwellings situate and being adjacent to the premises owned by the plaintiffs.

XV.

That the said Ordinances provide that each and every violation thereof, and each and every day for which such violation shall continue, shall constitute a misdemeanor, and that upon conviction, the person offending against each ordinances, may be fined and imprisoned, or fined or imprisoned; that the defendants threaten to enforce said Ordinances against the plaintiffs, and to cause the plaintiffs to be prosecuted and arrested for violating the said Ordinances by reason of the operation of said rock crushing plant and said hot mix asphalt plant, and the conduct of said excavations, and unless the defendants be enjoined and restrained by this Court from so doing, plaintiffs are informed and believe, and upon such information and belief allege, that the defendants will cause the plaintiffs to be arrested and imprisoned for such violations of said Ordinances, and will cause prosecutions to be instituted against the plaintiffs for said alleged violations, and a multiplicity of proceedings will be instituted and prosecuted by the defendants against the plaintiffs.

XVI.

That the plaintiffs have no plain, speedy or adequate remedy at law, and that unless an injunction be granted by this Honorable Court, enjoining the defendants from enforcing said Ordinances against the plaintiffs, in the particulars hereinbefore alleged, the plaintiffs will suffer great and irreparable injury.

XVII.

That the defendants have already instituted one prosecution against the plaintiffs for an alleged violation of said Ordinances, and threaten to immediately institute other prosecutions against the plaintiffs of the same nature, and to immediately compel the plaintiffs to suspend the operations of said rock crushing plant and said hot mix asphalt plant and of said excavation, and plaintiffs are informed and believe and upon such information and belief allege, that the defendants will do all of these things unless restrained by this Court from so doing, and that the plaintiffs will immediately suffer great and irreparable injury as a result thereof.

Wherefore, plaintiffs pray:

1. That an order to show cause be issued herein, requiring the defendants to appear and show cause, at a place and time to be fixed therein, why the defendants and each of them, their agents, representatives, servants and employees, should not be enjoined, pending the

determination of this action, from enforcing said ordinances against the plaintiffs, or from interfering with the plaintiffs in the enjoyment of their said property and the operation of the said rock crushing plant, hot mix asphalt plant and excavation work above referred to; and that pending the hearing of such order to show cause, a temporary restraining [256] order be issued, restraining the defendants and each of them, their agents, representatives, servants and employees, from doing these things;

2. That upon the trial of this case, plaintiffs have judgment for a permanent injunction, enjoining the defendants and each of them, their agents, servants, representatives and employees from enforcing said ordinances against the plaintiffs, or interfering with the operation by the plaintiffs or either of them, of said rock crushing plant, hot mix asphalt plant, and with the excavation operations hereinbefore referred to;

3. That plaintiffs have judgment for their costs herein incurred, and for such other and further relief as may seem just and equitable.

HANNA & MORTON,
Attorneys for Plaintiffs.

[Endorsed]: Filed Jan. 22, 1940. [257]

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 448415

PETER J. AKMADZICH and MARY LOUISE AKMADZICH,

Plaintiffs,

vs.

CITY OF LOS ANGELES, a municipal corporation, ARTHUR C. HOHMANN, as Chief of Police of the City of Los Angeles, RAY L. CHESEBRO, City Attorney of the City of Los Angeles, et al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause coming on regularly for trial in Department 18 of the above entitled Superior Court, on the 18th day of December, 1940, before Honorable Goodwin J. Knight, Judge Presiding, the plaintiff being represented by Messrs. Hanna and Morton, and the defendants being represented by Honorable Ray L. Chesebro, City Attorney of the City of Los Angeles, W. Jos. McFarland, Assistant City Attorney, and John A. Dundas, Deputy City Attorney; and the trial having continued on various days to and including January 10th, 1941; and evidence both oral and documentary having been intro-

duced on behalf of the respective parties; and the cause having been argued and submitted to the Court, the Court now renders [258] its decision, as follows:

The Court finds:

I.

That all of the allegations of Paragraph IV of the complaint are true, except that the property therein referred to consists of approximately sixty-six acres, and that said property, together with the improvements thereon, has a market value in excess of $125,000, if the said property be operated as a rock crushing and hot mix asphalt plant.

II.

That all of the allegations of Paragraph V of the complaint are true, except that the remainder of the property therein referred to is used for the purpose of storing crushed rock, sand and other materials, and for the purpose of excavating rock therefrom.

III.

That all of the allegations of Paragraph VI of the complaint are true except that it is not true that the property of the plaintiffs is so located that a rock crushing and hot mix asphalt plant can be operated on said premises with less inconvenience or annoyance to residents of the City of Los Angeles or to the general public than at any other place in

the City of Los Angeles where rock deposits are to be found.

It is true that the plant of the plaintiffs is so located that a rock crushing and hot mix asphalt plant can be operated on said premises with as little inconvenience or annoyance to residents of the City of Los Angeles or to the general public as at any other place within the City of Los Angeles where rock deposits are to be found and where rock crushing and hot asphalt plants are operated.

IV.

That all of the allegations of Paragraph VII of the complaint [259] are true, being the allegations starting at line 26, page 4 of the complaint and ending at line 10, page 5 of the complaint.

V.

That under the provisions of Ordinance Number 77,000, referred to in the complaint, the district in which the property of the plaintiffs is located is designated a residential district, with the exception of the area embraced in former Lots 19 and 20 of Tract 999, and that said property, with said exception, under the terms of said ordinance, may be utilized only for single or multiple family dwellings, apartment houses, fraternity or sorority houses, hotels, boarding or rooming houses, clubs, churches, schools, parks, playgrounds, libraries, or professional and home occupations when conducted within

the dwelling or apartment and in which no person not a resident of the premises is employed; or for retail or wholesale business, offices, motion picture houses or theatres, banks, beauty parlors, conservatories, studios (not including motion picture studios), photographic or art galleries, hospitals or sanitoriums (not including animal hospitals); dressmaking, shoe or tailor shops; morgues and undertaking establishments; automobile service stations, camps, garages, repair shops, laundries; dancing academies; places of amusement (not including horse, automobile or motorcycle race tracks, riding academies or stables); hand laundries; paint, paperhanging and decorating shops; carpenter, tinsmith and upholstering shops (not including sheet metal works, cabinet shops or furniture manufacturing shops); household goods storage; newspaper and printing establishments; police and fire station; public utility buildings and uses; public or quasi-public institutions of a philanthrophic or eleemosynary nature; farming, the keeping of domestic livestock and the raising of poultry, rabbits, bees, pigeons or other similar enterprises, and buildings incident to such farming, keeping of domestic livestock, raising of poultry, rabbits, bees, pigeons or other [260] similar enterprises.

VI.

That under the terms of Ordinance Number 70,210, referred to in the complaint, the plaintiffs

are prohibited from using their property described in the complaint, outside of the area of former Lots 19 and 20 of Tract 999, referred to in the complaint, for any purpose except for the purposes permitted by Ordinance Number 77,000, refered to in the complaint as hereinbefore set forth.

VII.

That none of the property of the plaintiffs has any value whatever for any other use except for the purpose of excavating rock and operating the rock crushing plant and hot mix asphalt plant in conjunction therewith, referred to in the complaint, and that if such uses of the property be prohibited, it will substantially destroy the value of the plaintiffs' property and result in the practical confiscation thereof.

VIII.

That other rock crushing plants and hot mix asphalt plants operated within the City Limits of the City of Los Angeles are more closely situated to places of human habitation and residential districts than the property of the plaintiffs in this action, and with respect to many of said plants, there are numerous residences and places of habitation nearby and within a distance of from 500 to 1,000 feet thereof, and that some of said plants are entirely surrounded by a closely built residential district. That the land upon which most of said plants are situated could safely be used for and is adaptable to the construction and maintenance of

residences for human habitation. That most of such other plants are situated in an area devoted to such purposes and residential purposes. That some of said plants were operating before the zoning ordinances of the City of Los Angeles were adopted or became [261] applicable to the properties upon which such plants are operated, and that with reference to others of said plants, the City of Los Angeles has adopted ordinances excluding the properties upon which such plants are operated from the residential districts of such city and permitting the operation of said plants.

That there is an area of approximately seventy acres immediately adjoining the property of the plaintiffs in this action, and of the same general type and character, and no farther removed from residences than the property of the plaintiffs, with relation to which the City of Los Angeles has adopted an ordinance permitting the use of said property for the purpose of removing rock therefrom.

IX.

That all of the allegations of Paragraph XIII of the plaintiffs' complaint are true except the third portion thereof, and as to the allegations of said portion, the Court finds that the ordinances referred to in the complaint are discriminatory, in that other property adjoining the property of the plaintiffs and similarly situated and of the same type and character, is classified so as to permit the removal of rock therefrom.

X.

That all of the allegations of Paragraph XIV of the plaintiffs' complaint are true except that the plaintiffs have conducted repair, remodeling and rehabilitation work upon their property and have engaged in other industrial activities upon their property between the hours of 6:30 p.m. in the evening and 6:30 a.m. in the morning, under such circumstances as to constitute an annoyance to surrounding residents.

In this connection the Court finds that if no repairs, remodeling, rehabilitation work or other industrial activity are conducted on the property of the plaintiffs between the hours of 7 p.m. in the evening and 7 a.m. in the morning, with the [262] exception of building a fire in the hot mix asphalt plant and building up steam in said plant, no annoyance will be suffered by the surrounding residents.

XI.

All of the allegations contained in Paragraph VI of the answer of the defendants herein are untrue except as hereinafter otherwise set forth.

It is true that the conduct and operation of the plaintiffs' plant and business creates some noise and a slight amount of dust and fumes, none of which substantially interfere with the enjoyment of the surrounding property, except repair, rehabilitation and remodeling and other industrial operations during the hours from 7 p.m. in the evening to 7 a.m. in the morning hereinbefore referred to.

It is true that as a necessary adjunct and incident

to the plaintiffs' plant and business, large numbers of motor trucks, trailers and other conveyances go to and from said plant, carrying rock and gravel and road paving materials, and that said motor trucks, trailers and other conveyances have at times commenced their operations in the early morning hours and continued throughout the day.

It is also true that said trucks and trailers have raised dust which has settled upon and about the property, homes and places of residence of persons in the neighborhood of plaintiffs' plant and business.

In this connection, the Court finds that the roads used by said trucks, trailers and other conveyances are now in course of being paved, and that when said paving is completed, the said dust will be eliminated.

It is true that the operation of said trucks, trailers and other conveyances creates noise which disturbs, to a certain extent, the peace and quiet of the neighborhood and of the persons [263] residing in the neighborhood or locality of plaintiffs' plant or business, but to no greater extent that the noise of trucks, trailers, automobiles and other vehicles on other roads and highways generally traversing residential areas throughout the urban and suburban districts in the State of California.

XII.

That the allegations of Paragraph XVI of the plaintiffs' complaint are true.

As conclusions of law, the Court finds:

I.

(a) That the ordinances described in the complaint, if enforced against the plaintiffs, will confiscate the property of the plaintiffs described in the complaint;

(b) That the ordinances described in the complaint are unreasonable, arbitrary and oppressive in their application, operation and effect upon the property of the plaintiffs described in the complaint;

(c) That the ordinances described in the complaint unreasonably and arbitrarily discriminate against the plaintiffs in the use of their property described in the complaint;

(d) That the ordinances described in the complaint, in their effect, application and operation upon the property of the plaintiffs described in the complaint, violate the provisions of Sec. 13, Art. I of the Constitution of the State of California;

(e) That the ordinances described in the complaint, in their effect, application and operation upon the property of the plaintiffs described in the complaint violate the provisions of Sec. 14, Art. I of the Constitution of the State of California;

(f) That the ordinances described in the complaint, in their effect, application and operation upon the property of the plaintiffs described in the complaint, violate the provisions of [264] Sec. I of the Fourteenth Amendment to the Constitution of the United States.

II.

That an injunction should be issued, enjoining the defendants and each of them, their agents, representatives, servants and employees from enforcing said ordinances against the plaintiffs in the present use and operation of the property of the plaintiffs described in the complaint, and from taking any action under or pursuant to said ordinances which would interfere with the plaintiffs in the operation of the rock crushing plant, hot mix asphalt plant and excavations referred to in the complaint; said injunction to remain in force and effect so long and during such time as the plaintiffs shall refrain from conducting any repair, remodeling, or rehabilitation work or other industrial activities upon their said property between the hours of 7 p.m. in the evening and 7 a.m. in the morning, with the exception, however, of building a fire in the hot mix asphalt plant and building up steam in said plant. That plaintiffs should be enjoined from operating their hot mixed plant, rock crusher or other parts of their plant on the holidays described in the judgment signed and filed herewith.

III.

That the temporary injunction heretofore issued in this action should be continued in force until the permanent injunction hereinbefore referred to shall become effective.

IV.

That the plaintiffs should have judgment for their costs herein incurred.

Done in Open Court this 30th day of January, 1941.

/s/ GOODWIN J. KNIGHT,
Judge.

[Endorsed]: Filed Jan. 30, 1941. [265]

In the Superior Court of the State of California in and for the County of Los Angeles

No. 448415

PETER J. AKMADZICH and MARY LOUISE AKMADZICH,

Plaintiffs,

vs.

CITY OF LOS ANGELES, a municipal corporation, ARTHUR C. HOHMANN, as Chief of Police of the City of Los Angeles, RAY L. CHESEBRO, City Attorney of the City of Los Angeles, et al.,

Defendants.

JUDGMENT

The Court having heretofore rendered its decision in writing in the above entitled action, now, therefore, it is ordered, adjudged and decreed:

I.

That the defendants and each of them, their agents, representatives, servants and employees be and they are hereby enjoined from enforcing the ordinances described in the complaint on file herein, against the plaintiffs, in the present use and operation of the property of the plaintiffs described in the complaint, and from taking any action under or pursuant to said ordinances which would interfere with the plaintiffs in the operation of the rock [266] crushing plant, hot mix asphalt plant and excavations referred to in the complaint.

This injunction shall remain in force and effect so long and during such time as the plaintiffs shall refrain from conducting any repair, remodeling or rehabilitation work or other industrial activities upon their said property between the hours of 7 p.m. in the evening and 7 a.m. in the morning, with the exception, however, of building a fire in the hot mix asphalt plant and building up steam in said plant.

The Clerk shall issue a writ of injunction pursuant to the provisions hereof.

II.

The temporary injunction heretofore issued in this action is continued in force until the permanent injunction herein provided shall become effective.

III.

It is further ordered, adjudged and decreed that the plaintiffs and each of them, their agents, representatives, servants and employees, are restrained and enjoined from operating the hot mix asphalt plant and the rock crusher, or from making repairs, additions and rehabilitations thereon and thereto, upon Sundays, Christmas Day, New Year's Day, Memorial Day, the Fourth of July, Labor Day, and Thanksgiving Day.

IV.

Plaintiffs shall recover of and from the defendants the costs of plaintiffs expended herein, taxed at the sum of $76.75.

One in open court this 30th day of January, 1941.

/s/ GOODWIN J. KNIGHT,
Judge.

[Endorsed]: Filed Jan. 30, 1941. [267]

Received copy of the within affidavit of Donald J. Dunne this 1st day of December, 1947.

OLIVER O. CLARK,
By /s/ M. BAILUS,
Attorney for Plaintiffs.

[Endorsed]: Filed Dec. 1, 1947. [268]

In the United States District Court, Southern District of California, Central Division

No. 7765—P. H.

HENRY WALLACE WINCHESTER, et al.,
Plaintiffs,

vs.

J. D. GREGG, and the CITY OF LOS ANGELES, a Municipal Corporation,
Defendants.

AFFIDAVIT OF HAROLD A. HENRY AND J. WIN AUSTIN ON BEHALF OF DEFENDANT CITY OF LOS ANGELES IN OPPOSITION TO PRELIMINARY INJUNCTION

United States of America,
State of California,
County of Los Angeles—ss.

Harold A. Henry and J. Win Austin, each being first duly sworn, depose and say:

We are now and during all the times hereinafter stated were duly elected, qualified and acting members of the City Council of the City of Los Angeles, a municipal corporation of the State of California, one of the defendants in the above-entitled action. At the present time affiant Harold A. Henry is the president of said City Council and a member of its Planning Committee. Both affiants during all the times hereinafter stated, were [269] two of the three members of the Planning Committee

of said City Council, the same being one of the duly constituted and regularly appointed standing committees of said City Council to which the said City Council, in the ordinary conduct of its functions, refers matters pending before it pertaining to city planning, zoning and related matters, for purposes of investigation, consideration and recommendation. One Carl C. Rasmussen who was the third member of said Planning Committee during the times hereinafter stated is no longer a member of said City Council.

On or about August 1, 1946, the defendant John D. Gregg appealed to said City Council from a decision of the Planning Commission of said city denying an application theretofore made by said Gregg to said commission for a conditional use permit to excavate rock, sand and gravel upon certain properties owned by him in the San Fernando Valley district of said city and more particularly described in the complaint of the plaintiffs herein. Said application was made by said Gregg under the provisions of Section 12.24 of Ordinance No. 90,500 of said city, being the comprehensive zoning ordinance of said city referred to in the complaint of the plaintiffs herein. On August 8, 1946, said City Council duly referred the matter of said appeal to said Planning Commission for a report concerning its action in the matter of said application. On or about August 20, 1946, said Planning Commission in writing reported to said City Council concerning its action on said application. On August 23, 1946, said City Council duly referred the matter

of said appeal and said report of the Planning Commission to its said Planning Committee, of which we were then members as aforesaid.

Thereupon said Planning Committee duly, regularly and thoroughly considered and investigated the matter of said application and said appeal and in the course of said investigation considered all documentary evidence theretofore submitted to said Planning Commission by and on behalf of said applicant John D. Gregg and by and on behalf of all persons protesting the granting of his said application and also considered documentary evidence submitted to said committee by and on behalf of said Gregg and said protestants. A portion of the documentary evidence so submitted to said committee by said John D. Gregg and considered by said committee, consisting of various documents and maps, is attached hereto and marked Exhibit "A."

In the course of its investigation and consideration of said application and appeal said committee on two occasions visited and inspected the lands covered by said application and the lands and properties shown on the map, Exhibit "A," attached to the complaint of the plaintiffs in this action and therein designated as the "community area," and the rock, sand and gravel plant of said John D. Gregg adjacent thereto. One of said visits of inspection was made in the company and under the direction of representatives of said John D. Gregg and one of said visits was made in the company and

under the direction of representatives of persons protesting the granting of said permit so applied for by Gregg.

In the course of its investigation and consideration of said application and appeal said committee gave notice of and held a public hearing thereon as required by Sections 12.25-C and 12.32-C of Ordinance No. 90,500 of said City. Notice of said hearing was sent by mail, as required by said ordinance, to all persons owning real property within a radius of 300 feet of the exterior boundaries of the property covered by said application. Said hearing was attended by many representatives of and witnesses for said John D. Gregg and said protestants respectively, evidence, both oral and documentary, was submitted by and on behalf of the respective parties and said hearing was conducted fully, fairly and impartially to both sides of the controversy. [271]

It was disclosed to said committee by the evidence presented to it as aforesaid and by its said investigations, that many millions of tons of rock, sand and gravel are consumed annually by the City of Los Angeles and by many private users, in the construction of highways, bridges, dams and buildings of all sorts and that the demand for said materials is constantly increasing; that there are only two adequate sources of supply of such material near the City of Los Angeles, namely, the area in the San Fernando Valley district in the vicinity of the property covered by said application and another area in the San Gabriel Valley

some 15 or 20 miles to the east of said San Fernando Valley area; that the lands in said San Fernando Valley area, then available for the production of said materials, and so zoned as to permit such production, were nearing exhaustion, as a consequence whereof the cost of said materials, delivered to points in the San Fernando Valley and to points in the general westerly part of the City of Los Angeles, would be materially increased by reason of the fact that the same would have to be supplied from said San Gabriel Valley district and would necessarily involve a largely increased cost of transportation, said increase being estimated at approximately $1.00 per ton; that the City of Los Angeles alone consumes about 26,000 tons of such materials per month, the great majority of which are processed by said city at plants located near said San Fernando Valley area of production.

Thereupon and after full and thorough consideration of all the evidence submitted to it as aforesaid and the facts disclosed by its said investigation and arguments presented by and on behalf of the respective parties to the controversy, said committee, upon the basis of said evidence, facts and arguments, on or about October 2, 1946, reported to said City Council in writing, a copy of said report being attached hereto and marked Exhibit "B." [272]

Said City Council, assembled in regular meeting on October 2, 1946, conducted a further public hearing upon the matter of said application and said appeal which was attended by representatives of and

witnesses for the respective parties to said controversy, both the applicant and the protestants, and heard and considered evidence both oral and documentary by and on behalf of both of said parties. Said last mentioned hearing was held by said City Council despite the fact that no such hearing was required by said Ordinance No. 90,500. Said City Council adopted said report of said committee and thereby authorized the granting of said conditional use permit to said John D. Gregg upon the terms and conditions set forth in the said report of said committee, all as set forth in paragraph numbered XXI of the complaint of the plaintiffs herein.

It is not true that the actions of said Planning Committee in investigating and considering the matter of said application and said appeal or in conducting said public hearing thereon, or in reporting as aforesaid to said City Council, or the action of said City Council in conducting said public hearings held before it, or in considering said report or in adopting and approving same or in authorizing the issuance of said permit, were arbitrary, unreasonable, unfair, unjust or oppressive, or repugnant to the concept or objections of the master zoning plan of said city or subversive of the public welfare, health and safety; nor is it true that any of said actions were done or taken for the purpose of preferring said John D. Gregg as against any other property owners within said community area in the use and enjoyment of their properties or for the purpose of enabling said Gregg to expand his operations without removing

his facilities to a different location. On the contrary it is true that all of said actions were had and taken with a view to the preservation and protection of the rights of all interested private parties and with a further view to serving [273] the needs of the public generally and of the City of Los Angeles, particularly in view of its present vast expansion of population and territory, for rock, sand and gravel to be used for the necessary construction purposes aforesaid. The conditions upon which said permit was granted by said City Council, as contained in the said report of its said Planning Committee, with respect to the manner and method of said Gregg's operations upon said property, were inserted therein solely for the purpose of protecting the plaintiffs in this action and all other persons residing in the neighborhood against danger or offensive conditions arising from such operations.

/s/ HAROLD A. HENRY,
/s/ J. WIN AUSTIN.

Subscribed and sworn to before me this 24th day of November, 1947.

/s/ CHAS. D. WILLIAMS,
Notary Public in and for Said
County and State.

My Commission Expires March 21, 1949. [274]

EXHIBIT A

APPEAL TO CITY PLANNING COMMITTEE OF CITY COUNCIL, CITY OF LOS ANGELES, FROM THE DECISION OF THE CITY PLANNING COMMISSION

Case of John D. Gregg

September, 1946.

City Planning Committee
of the City Council,
City of Los Angeles,
City Hall,
Los Angeles 12, California.

Gentlemen:

In order to attempt to furnish a convenient method by which the individual members of the City Planning Committee may familiarize themselves with the facts and circumstances surrounding the application of John D. Gregg for a permit to use certain lands lying northeasterly of Glen Oaks Boulevard between Pendleton and Wicks Streets in the Roscoe area, for the purpose of mining rock, sand and gravel, which said application is now on appeal before your Honorable Body, this Memorandum is submitted. It will include the following:

1. List of Witnesses.
2. List of Business Organizations Which Have Endorsed the Application of John D. Gregg.

3. List of Individuals and Companies Which Have Endorsed the Application of John D. Gregg.
4. List of Exhibits.
5. Summary of Conclusions.
6. Questions Discussed. [277]

List of Witnesses:

1. Conrad McKelvay, Area Director of the National Housing Agency. His immediate superior is Wilson W. Wyatt. Mr. McKelvay's offices are located at 9th and Hill Building, 315 West 9th St., Los Angeles.

2. Howard Holtzendorff, Director of Housing Authority, City of Los Angeles, 1401 E. 1st St., Los Angeles.

3. Ernest Orfila, Attorney at Law, Chairman of the Board of Directors of Department of Veterans of the State of California, 206 S. Spring Street, Los Angeles.

4. Herman Cortelyou, Director of Maintenance and Sanitation Bureau, Department of Public Works, City of Los Angeles, City Hall, Los Angeles.

5. H. A. Holm, Purchasing Agent, City of Los Angeles, City Hall, Los Angeles.

6. A. G. Shaw, Manager, Associated General Contractors of America, Southern California Chapter, Los Angeles.

7. Edward A. Sills, Secretary-Manager, Building Contractors Association of California, 121 So. Alvarado Street, Los Angeles.

8. George Mannschreck, Secretary, Contracting Plasterers' and Lathers' Association of Southern California, 564 Chamber of Commerce Building, Los Angeles.

9. J. R. Keane, President, Western Asphalt Association, 515 S. Flower St., Los Angeles.

10. E. P. Ripley, President, General Concrete Products Company, and President, Concrete Masonry Manufacturing Association, 15025 Oxnard St., Van Nuys.

11. Kay Greer, President, Associated Paving Contractors of Southern California, 11803 Gilmore Street, North Hollywood.

12. H. C. Mathers, Secretary, L. A. Brick Exchange, Los Angeles.

13. J. A. McNeil, General Contractor, The J. A. McNeil Company, 910 Olympic Boulevard, Los Angeles; also Director of Associated General Contractors of Southern California.

14. L. Glenn Switzer, Manager, Transit Mixed Concrete Company, Pasadena. [278]

15. Ray Best, President, Southwest Paving Company.

16. Harold Judson, Attorney at Law, representing Mr. Best.

17. Robert Mitchell, President, Consolidated Rock Products Company.

18. Harry Jumper, Engineer, Consolidated Rock Products Company.

19. Eugene Cox, Jr.

20. Ralph Cornell, Landscape Architect and Designer of Contemplated Civic Center.

21. John Knight or Louis M. Solomon, representing Knight and Parker California Associates, Subway Terminal Building, Los Angeles.

22. Emil Pozzo, Pozzo Construction Company, 2403 Riverside Drive, Los Angeles.

23. Harry Morrell, Sunland, Calif.

24. C. M. Barber or Hugh Barnes, District Engineer and Manager, respectively, of Portland Cement Association.

25. Francis Baird, Cooperative Building Materials of Los Angeles.

26. Frank S. Smith, President, Mason Contractors Exchange of Southern California.

27. Roland McFayden, Chairman, County Counsel Veterans' Housing Committee.

28. John G. Gregg, the applicant. [279]

List of Business Organizations Which Have Endorsed the Application of John D. Gregg

Associated General Contractors of America, Southern California Chapter.

Building Contractors Association of California.

Building Contractors Association of California, San Fernando Chapter.

Building Contractors Association of California, Glendale-Burbank Chapter.

Contracting Plasters' and Lathers' Association of Southern California.

Concrete Masonry Manufacturing Association.

Masons' Exchange of Southern California.

L. A. Brick Exchange.

Western Asphalt Association.

United Brotherhood of Carpenters and Joiners of America, Local Union 1913, San Fernando Valley, Van Nuys.

Portland Cement Association.

Sherman Oaks Chamber of Commerce.

Van Nuys Chamber of Commerce.

Teamsters Joint Council American Federation of Labor. [280]

List of Individuals and Companies Which Have Endorsed the Application of John D. Gregg

Alden Building Material Co., 1647 West Slauson Avenue, Los Angeles.

R. F. Rasey, as President of Associated General Contractors of America, Southern California Chapter, 707 Architects Building, Los Angeles.

E. J. Butterworth, 11200 Penrose St., Roscoe.

David J. Bourdon of the David Bourdon Lumber Co., 5310 Vineland, North Hollywood.

Burbank Builders Supply, 200 So. Victory Blvd., Burbank.

Canoga Park Lumber Co., 21339 Saticoy St., Canoga Park.

Eclipse Plaster Company, 133 E. Jefferson Blvd., Los Angeles.

Encino Lumber Co., 16917 Ventura Blvd., Encino.

The FMC Corporation, 9274 Santa Monica Blvd., Beverly Hills.

F. R. Foss of F. R. Foss Building Materials, 9421 So. Vermont, Los Angeles.

John W. Fisher Lumber Co., 14th St., and Colorado Ave., Santa Monica.

Fox-Woodson Lumber Company, 714 E. California Ave., Glendale.

General Concrete Products, 15025 Oxnard St., Van Nuys.

Gordon Materials Co., 7346 Santa Monica Blvd., Los Angeles.

Graystone Tile Company, 7040 Lankershim Blvd., No. Hollywood.

Hagen Materials Co., 943 Aviation Drive, Glendale.

Hammond Lumber Company, 7233 Deering Ave., Canoga Park.

Hill Co., 5815 So. Normandie Ave., Los Angeles.

L. R. Hasiwanter, 8719 El Tovar Place, Los Angeles.

Jake M. Kyle, 1730 Glenwood Road, Glendale.

Ott L. Lewis, 1821 Clark Ave., Burbank. [281]

Mutual Building Material Co., 9272 Santa Monica Blvd., Beverly Hills.

Quality Paint & Garden Supply, 721 No. La Brea, Inglewood.

Southwest Paving Company, 11402 Tuxford Ave., Roscoe.

Transit Mixed Concrete Company.

Westside Building Material Co., 8845 Washington Blvd., Culver City.

Westwood Building Material Co., 11246 West Pico Blvd., Los Angeles.

Valley Brick & Supply Co., 6100 Sepulveda Blvd., Van Nuys.

Victory Materials Company, 254 West Olive Ave., Burbank.

Acts of Chambers of Commerce

Previously the Encino Chamber of Commerce, the Reseda Chamber of Commerce and the North Hollywood Chamber of Commerce had adopted resolutions supporting the stand of the Roscoe Chamber of Commerce opposing this application. After an investigation was made each of the above, except the Roscoe Chamber of Commerce, rescinded their action and have expressed in writing the result of that action. The action of the North Hollywood Chamber of Commerce was not taken until after the hearing before the Planning Commission. By a vote of fifteen to two the board of directors of the North Hollywood Chamber of Commerce announced that they do not oppose the application of John D. Gregg.

On September 19, 1946, the Board of Directors of the Los Angeles Chamber of Commerce considered this question and by resolution urges the city council to appropriate action. [282]

List of Exhibits

1. An aerial map of the area involved in the application showing the relationship of the location of John D. Gregg's plant to the property involved in the application. Said map is attached hereto and marked Exhibit "A."

2. A map prepared by the staff of the city planning department from a map previously prepared by the "soil survey of the San Fernando area, U. S. Department of Agriculture," showing location of the San Fernando cone. Said map is attached hereto and marked Exhibit "B."

3. A map prepared by the staff of the city planning department purporting to show the surface area of the acreage now zoned in Zone M 3, where where the mining of rock, sand and gravel is permitted, including the area covered by injunction restraining the City of Los Angeles from enforcing the provisions of the zoning ordinance which prohibits the mining of rock, sand and gravel in the said area. Said map is attached hereto and marked Exhibit "C."

4. A computation showing available tonnage on 451 zoned acreage. Said computation is attached hereto marked Exhibit "C-1."

5. A chart illustrating the ratio of per capita consumption of rock, sand and gravel, showing the market demand per capita based on population of Los Angeles county. Said chart is attached hereto and marked Exhibits "D" and "D-1," together with a chart from 1917, with estimates of future population.

6. A schematic diagram of cross section of San Fernando rock cone illustrating rock deposits and excavated areas. Said diagram is attached hereto and marked Exhibit "E."

7. A map showing the Gregg plant property, plant area, stock pile area and mineable land. Said map is attached hereto and marked Exhibit "F."

Summary of Conclusions

1. The rock, sand and gravel business is a lawful and useful business.

2. The deposits of sand and gravel that can be mined under existing regulations are limited. Only a maximum of 70,000,000 tons remains in property presently zoned for mining in the San Fernando valley area, and all of this tonnage is not available.

3. The present rate of consumption from the San Fernando Valley is about 4,000,000 tons per annum.

4. All estimates point to a demand of over 10,-000,000 tons per annum from the San Fernando Valley.

5. If reserves are not made available plants can not be expanded to meet the demand.

6. The land involved in the application and the land in the area is not desirable for residential purposes.

7. Excavated land can be utilized for many beneficial purposes. [284]

Questions Discussed

It is taken for granted that the rock industry is essential and that the available supply of rock, sand and gravel is necessary for the welfare of any community. The City of Los Angeles finds itself in one of the most fortunate positions, with reference to its supply of rock, sand and gravel, of any large community in the United States. There are two principal deposits in the County which contain this

basic material. They are: the deposit located near Azusa in the County of Los Angeles, generally known known as the "San Gabriel Cone" and the deposit located near Roscoe in the San Fernando Valley, generally known as the "San Fernando Cone." These two deposits are unique for the reason that they are located close to the market and points of consumption. Thus the City of Los Angeles and the County of Los Angeles are in the extraordinary fortunate position of having a cheap source of supply for one of the most basic of all building materials. Other large cities find it necessary to transport rock from great distances and consequently pay many times the price that rock costs in this area.

Up until the current abnormal situation induced by World War II, building in Los Angeles County was notoriously cheap. One of the factors that contributed to this low cost of building was the availability of rock aggregate.

The rock industry has been operating in the San Fernando Cone since the year 1909. Up until the advent of zoning the rock industry was located wherever the fancy of a particular operator desired. So plentiful was the supply. The growth of the City of Los Angeles after World War I demanded some kind of comprehensive planning. In 1920 the City of Los Angeles adopted Ordinance 33173 which is known as the "Residential District Ordinance." That ordinance provided in effect that all property then in use might be used for the purpose to which it was then devoted and all other property was resi-

dential property. The City grew, population doubled, floods came and soon it was necessary to establish flood control projects. Since the best rock lands are necessarily in the path of wash-ways, it was necessary in order to provide for flood control channels that hundreds of acres be withdrawn from the development for the basic aggregates and devoted to flood control projects. The development of the City has been such that zoning, which is designed to preserve the best uses of the land and to promote the most ultimate good for the public generally and protect the general public welfare, has created a condition where we now find that, unless a forward looking picture is established, the City of Los Angeles, like other cities, will be forced to transport rock and sand for many miles. It will be required to pay many times the present cost for that which we have in our own back yard. We will be placed in the position of carrying coals to Newcastle because we do not protect one of our great natural resources. [285]

Does the welfare of the City of Los Angeles demand that the natural resources available only where found be developed for the use and benfit of the community at large or will we permit these resources to be destroyed by the encroachments of unnecessary residential development?

I say an unnecessary residential development for the following reasons: There are thousands of acres of vacant land in the City of Los Angeles and the County of Los Angeles where residences might be constructed which are far more desirable for such

use than the land in question. It is a matter of common knowledge that residential buildings will some how be constructed anywhere if adequate restrictions are not placed thereon. Residences have been constructed on sheer cliffs, over swamps and in river bottoms, where more desirable land was available nearby. Such is the nature of man.

To the question above I will ask:

1. Where does the City of Los Angeles and the County of Los Angeles obtain its rock, sand and gravel?

There are two primary sources of rock, sand and gravel that serve the County of Los Angeles. They are the "San Fernando Cone" and the "San Gabriel Cone." Both are termed by the rock industry as base points. The San Fernando Cone serves that portion of the County of Los Angeles lying west of Main Street in the City of Los Angeles. The San Gabriel Cone serves that portion of the County of Los Angeles lying east of Main Street in the City of Los Angeles.

2. In so far as the area in question is concerned, the San Fernando area, how much material is available in the San Fernando Cone located in the zone where the mining for rock, sand and gravel is permitted, namely, the M 3 zone?

As of this writing there are 451 acres of land in the San Fernando Cone that is zoned M 3 and the mining of rock, sand and gravel in said area is permissible. (See Exhibit "C"). This figure of 451 acres is the figure accepted by the Department of City Planning as being zoned M 3 in the San Fer-

nando Cone. Examination of Exhibit "C" will disclose that this 451 acres merely includes the surface area of the property and does not allow for the land necessary for plant structures, stock piles, or land that cannot be mined by reason of the necessity of maintaining a slope ratio which will be adequate to prevent slides or cave-ins, wihch ratio should be at least one foot to one foot of decline. [286]

The 451 acres measured at the surface as indicated on Exhibit "C" are designated by letters. These letters indicate the ownership of all parcels in the area. In order to compute the net acreage available as reserves after making provision for adequate area for stock piles, plant facilities and necessary slopes, we have prepared and caused to be attached hereto a chart. See Exhibit "C-1."

In computing the amount of the area which is necessary in order to provide for slopes, plant space and stock piles we have used the method shown in Exhibit "C-1."

We Find That 310 Acres Not 451 Acres Are Available for Mining.

How Many Tons of Rock, Sand and Gravel Are Available for Production from the San Fernando Cone Under Existing Zoning Regulations?

There Are Approximately 200,000 Tons of Rock, Sand and Gravel in a Net Mineable Acre of Land, Dug to an Average Depth of Approximately 90 Feet. This Figure Varies Slightly but Not Sufficiently to Make Any Material Difference. 310 Times 200,000 Tons Gives Us 62,000,000 Tons, but Let Us Be a Little More Liberal and Say That This Figure Will Not Exceed 70,000,000 Tons.

Close inspection of Exhibits "C" and "C-1" demonstrates several definite situations:

First: There is a Maximum of 70,000,000 Tons Available in Zoned Reserves.

Second: Only Certain Properties Are Available to Particular Companies or Operators.

Third: 35,000,000 Tons Have Either No Plant Facilities or in Two Cases Have Portable Plants with Limited Production. [287]

Fourth: 12,000,000 Tons Are Devoted to Other Industrial Uses or Are Owned by Persons Not Connected with the Rock Industry.

Fifth: Only 23,000,000 Tons Are Available for Mining by Existing Plant Facilities.

Sixth: These 23,000,000 Tons Constitute a Pitifully Small Supply Since a Majority of the Land Is Under the Control of One Company with a Production Capacity of Approximately 1,800,000 Tons Per Year.

Thus, We Have Two Problems:

First: We Must Utilize All of Our Present Productive Facilities, and

Second: Provide Adequate Reserves to Justify Expansion and Thereby Avoid a Real Bottleneck in the Near Future.

Today's Problem

As of June 30, 1946, the production of sand and gravel in Los Angeles County has reached almost 10,000,000 tons, of which approximately 40% was produced from the San Fernando Cone. However, throughout the history of the rock industry about

50% is produced from the San Fernando Cone and the other 50% from the San Gabriel Cone.

This production was made possible only by some of the operators on an overtime basis and extending their operations beyond their economic capacity. As of June 30, 1946, the Gregg plant was furnishing materials to the market at a rate which exceeded 1,200,000 tons a year. The Gregg plant is not, at the present time, mining rock. A shut-down was made necessary by reason of the fact that Mr. Gregg has considerably less than four acres of mineable property, which, if dug at the rate of 100,000 tons a month, would be exhausted in not to exceed six months. [288]

A diagram of the Gregg property now zoned showing his plant area, the stock pile area and mineable lands, is attached hereto and marked Exhibit "F." An examination of this Exhibit will illustrate the amount of area necessary to operate a plant's fixed installations, and the area necessary for stock piles. Ultimately, when the plant is to be abandoned this area may be mined. Mining of such area precludes further use of the plant and eliminates production capacity.

Financial conditions controlled by capital investment and current taxes will not permit Mr. Gregg to dig out his remaining property and liquidate his plant and plant installations in so short a time.

Nevertheless, in order that the demand of the market may be met to the fullest extent possible, Mr. Gregg caused part of his entire crew, together

with his rolling stock, to be transferred to Consolidated Rock Products Company, so that they might have additional facilities to help supply the market; likewise, he is permitting his plant to be operated for the purpose of processing and grading rock, sand and gravel dug elsewhere and hauled to his plant by truck. The results have been that most of his crew remains employed and the demands of the market have, in some measure, been met.

The Situation in Which Mr. Gregg Finds Himself Is Characteristic of, and but an Illustration of, the Condition in Which Other Members of the Rock Industry Will Be Placed in a Comparatively Short Time, if Zoning Problems Concerning the Industry Are Not Met and Met Now. To Meet the Demands of the Current and Future Market Every Available Production Facility Must Be Not Only Maintained but Must Be Expanded. Capital Investments in the Industry Must Be Made. No Business Can Be Expected to Expand Production, Increase Its Capital Investment and Then Drive Itself Out of Business. An Industry Must Have Large Raw Material Reserves or Financing Will Not Be Available. It Must Know That It Will Have Sufficient Raw Material Available to Justify Expansion and Furnish Reasonable Assurance of a Return of the Capital Invested. It Must Know, as Must the Textile Manufacturer or Any Other Manufacturer, What the Source of Raw Material Is. In This Case the Rock Is Available if the Authorities Act.

City Authorities Will Act

I am Sure That the City Authorities Will Recognize This Situation and Provide Means Whereby the Industry Will Be Aided in Its Program to Meet the Needs of the People of the City and County of Los Angeles, Rather Than Taking an Action Restricting the Operation of the Industry. Available Production Capacity Should Be Utilized to Its Fullest Extent Now. Necessary Permits Authorizing the Use of Reserve Lands and Additional Zoning Should Be Granted so That Operators May Be Assured of a Reasonable Chance to Regain Their Capital Invested.

Having shown the quantity of material available in the San Fernando Cone, and the necessity for making additional [290] material available for mining, we are concerned with the next question:

What Are the Demands of the Market, and How Long Will the Existing Reserve Supply Last?

To answer this question, we have obtained information from every reliable source at our disposal. Sources of information include: The Regional Planning Commission of Los Angeles County, Los Angeles Chamber of Commerce, U. S. District Court Bankruptcy Case No. 25816-H, and the findings of the Examiner made therein, and surveys made by Westinghouse Electric Company, based on surveys made by more than twenty organizations, plus their independent survey.

The Westinghouse Electric Company's survey states:

"According to 78% of Our Leading Statisticians, Los Angeles Is Destined to Become the World's Largest City Sometime Between 1960 and 1975."

In order to become the world's largest city, the present population must more than triple its present population.

In order to attempt to compute the tonnage or rock necessary to furnish the market demand within the foreseeable future, we have ascertained the ratio of rock consumption to existing population between the years 1920 and the date hereof. (See Exhibits D and D-1.)

Examination of these exhibits will disclose such a ratio for all years between 1917 and 1945, excepting only the years 1941, 1942 and 1943. The figures for these years are not available. Further examination of the exhibit will disclose that during the years 1920-1929 inclusive (the previous largest building period in Los Angeles' history) rock products were consumed in Los Angeles County at an annual average rate of 4.54 tons per capita. The highest consumption was reached in 1924 with a rate of 6.13 tons per capita.

The average annual population in the 1920 decade was 1,623,000 persons. Translated into tons per capita we find an average annual consumption of 7,712.668 tons.

At the beginning of the 1944-1954 decade the population was 3,225,000. The estimates of reliable sources indicate that the population in 1954 will be at least 4,270,000. Accepting that figure we find that the average annual population would be 3,785,-

000. Now assume that we will require at least the 1920-1929 average, i.e. 4.54 tons per capita, the minimum annual production would have to be 17,-183.000 tons, with a production rate of 19,385,000 tons in 1954. [291]

The above figures are estimated averages only. They do not consider peak production or consumption. The peak will of necessity be as large as the 1920-1929 peak which was 6.13 per capita in 1924. In 1924 the population was 1,509,318, production was 9,216,000 tons.

6.13 tons per capita based on the 1945 population of 3,320,000 would require about 20,351,000 tons.

In 1925 the population of the County was 1,864,-735. Today the population of the City is just about the same figure. In 1925 the production was 10,-000,000 tons or 5.37 tons per capita. Present consumption is at the rate of 10,000,000 tons in the entire county with the population figure in 1945 of 3,320,000 and yet our consumption rate is only 2.90 tons per capita.

It takes little imagination to see what the demands of the market will be once materials generally become available.

If we stop to realize that during the 1920's housing foundations were for the most part merely an exterior frame with the interior supported by 18′ pyramids; while today interior supports must be solid; if we stop to realize that the type of construction required or done twenty years ago was relatively light when compared to the demands of today; if we stop to realize that we have the greatest

housing shortage that we have ever witnessed; that all agencies of government and business interests generally are doing their utmost to speed production; that no class A office buildings have been build since about 1930; that no first class hotels have been built since about 1938; that hundreds of miles of streets, highways, freeways, and sidewalks must be constructed; that airport officials have difficulty in planning to keep airports in pace with aircraft development; that 10,000 foot ways are required today; that commercial building must keep pace with residential building; that factories must and will be built; then we are forced to conclude that an average per capita consumption of rock products, during the next ten years, will be many times greater than the 1920-1929 average. Modern architecture demands greater use of rock, sand and gravel. And yet our present consumption rate is only 2.9 tons per capita.

This exhibit will also disclose another interesting situation:

In 1919, the first year after World War I, the consumption rate was 1.24 tons per capita. In 1920 the rate grew to 2.47 tons per capita, and climbed steadily until the peak was reached in 1924 at 6.13 tons per capita.

In 1945 the rate was 1.70 tons, today it is 2.9 We can expect a steady climb until a peak is reached; when that peak will come is not foreseeable. But it is reasonable to assume that a pattern similar to that of the 1920's may be [292] followed and that the peak of at least 6.13 tons will

be reached by 1949 or 1950. We find that we will have to produce about 24,000,000 tons; 15,000,000 more tons than we produced in 1924. Two and one-half times as much as we are consuming today.

Where Will We Get the Rock?

Lessons of the Past

One of the lessons that the United States learned in World War II was that the only way to prevent critical shortage of material was to act before the shortage occurred. There was no shortage of munitions until we needed them.

Today, the Gregg plant is intact. Mr. Gregg is ready to start expansion. Necessary materials to expand operations have been on order for months. To force him to curtail operation is to deprive the market of over 1,200,000 tons per year.

But New Plants Cannot Be Built Within Two Years. We Must Protect What We Have Now and Plan for the Future.

What Use Can Be Made of the Land?

What use can the land involved in the application be put, if it is not used for the mining of rock, sand and gravel?

I will stipulate that the land in question can be used for residential purposes. I repeat, residential buildings can be placed almost anywhere. But the mere fact that residential buildings are so placed does not make the land desirable residential property. Marginal lands, river bottoms, cliffs and

swamps may be used for residential purposes, and frequently are so used, because such land is cheap and undesirable. In order to ascertain whether or not this land was desirable residential land, Mr. Gregg made application to the Federal Housing Authority for approval of a subdivision of the land in question for a mortgage-insured loan. This application was rejected by the Federal Housing Authority, with a statement that the land did not meet the qualifications of the Federal Housing Act for a mortgage-insured loan.

A letter from the Federal Housing Authority covering this subject is on file in this case.

Also, Mr. Gregg caused an application to be made through a veteran of World War II for a bank loan covering the construction of an authorized veteran's home, on a part [293] of the land in question. His application was made through the Security-First National Bank of Los Angeles, Burbank Branch, and was rejected. A letter from the bank stating its reasons for its rejection is on file in this case.

The opponents make this suggestion:

Sub-divide the land into six lots per acre; the Planning Commission standard is about five lots to the acre (minimum), sell these sub-standard lots for $1500.00 each, and build $4500.00 houses on the same.

At the present market, $4500.00 will build a house of about 600 square feet without necessary outbuildings, such as garages.

Opponents prove exactly that—that marginal land can be used for the cheapest kind of housing, and create a condition which would soon become known as a blighted area.

We offer to use the land for the purpose of serving public generally.

The opponents propose to use Mr. Gregg's land for the purpose of creating a blighted area and sub-standard housing.

Aesthetic Considerations

Whenever any question arises concerning zoning, the aesthetic considerations are always evident, even though aethetics, as such, have no basis at law. The business of mining of rock, sand and gravel is a lawful and useful occupation and cannot be prohibited by legislation unless such legislation is necessary for the protection of legal rights.

The Superior Court of the State of California, in The People v. Hawley, 207 Cal. 395, stated:

> "No authority is required to support the proposition that the business of excavating rock and gravel by the owner of lands belonging to him is a lawful and useful occupation and cannot be prohibited by legislation, except in cases where the enactment of such legislation may be found necessary for the protection of legal rights of others."

That case recognizes the proposition that although legislation which prohibits the mining of rock and gravel might be legal under certain circumstances

it would not of necessity injure a recognizable legal right of another person. To deny this permit would not be an attempt to regulate but would be absolutely prohibiting the operation of a business that can be operated in such a manner that no one else's legal rights are affected. [294]

It must be admitted that the excavation of rock, of necessity, leaves a large hole in the ground; that to some extent large excavations do offend the aethetic senses of some people. It must be admitted that the rock industry is a heavy industry and requires heavy machinery to move the processed rock and as a result heavy trucks are utilized for that purpose. Consequently the question has always arisen:

After the Land Is Fully Excavated, What Will Happen to the Land?

It is contended by some that these excavations are eye sores, that the value of the land itself is diminished and cannot serve any useful purpose to the community; that when the resources contained in the deposit are exhausted the rock operators abandon the property and let nature take its course; that the existence of excavations diminishes the property value of the surrounding property. These contentions are without merit. Industry's conception of its duty or obligations to the community has changed in the last twenty years. Modern planning demands that thought be given to the future.

First: Excavations may be used by the Municipal authorities as dumps for either combustion or non-combustion rubbish.

Second: Excavations may be used for the purpose of providing dumping places for materials necessarily excavated as the result of construction. Dumps, of course, are not the most desirable use to which any property could be put from aesthetic standards, but they are necessary.

Third: If a plan was adopted by the Municipal authorities which would define a rock area and permit excavation within that area, utilizing the entire area from border to border, and excavating on a gradual slope and dug to a uniform level, many highly desirable uses of the property might be made. Instead of having one excavation here and an excavation there, within a rock-bearing strata, one big excavation would ultimately result. Such excavation might be used for any of the following purposes:

1. A park with all types of amusement facilities.
2. A highly desirable site for an athletic stadium.
3. An industrial site.

The unsettled conditions of the world today indicate that such a site might be highly useful in the event of an atomic war.

Pending the ultimate development of such an area, the following steps could be taken in order to lessen the aesthetic objections which exist in the minds of some.

A uniform slope with minimum set-backs to existing streets and highways could be established. As the [295] excavation proceeds in accordance with the previous plan, the excavated area could be

fenced, and vegetation of a type which could be sustained in the area, planted along that fence for the purpose of screening the mechanical operations necessary for the rock business from casual observation.

Property values will not necessarily diminish by the excavation of a gravel pit. I cite as example the current housing project known as Laurel Canyon Village. This veterans' housing project is built immediately adjacent to a gravel pit, and adjacent to Fernangeles Park. These houses built on 700 square feet are priced a $8600.00, $9100.00, on $1500.00 lots.

I submit that there is no one single excavation in Los Angeles County that has reverted to the State of California as a result of delinquent taxes.

It is my conclusion that the objections of the people to the operation of the rock industry are not real, but imaginary. I know of no reason why planning, looking to the future, taking into account screen fencing and screen planning, would not remove these objections, whether they be real or imaginary.

What Use Will Be Made of The Property?

The applicant will not construct a permanent plant on the property involved in the application. All that will be done is to extend a conveyor belt from the present plant to the point of excavation. At this point a shovel, electrically powered would

be used. If the character of the material requires, a primary, crusher will be installed. The material excavated would be processed at the present plant.

No noise would be created, no dust or no trucking would be involved. All that we would do from this property would be to excavate, and transport. No processing and no stock piles are involved; except for the excavation, no change will be evident.

This character of operation will not invade any legal right of any person.

Respectfully submitted,

/s/ CLYDE P. HARRELL, JR.,
Attorney for John D. Gregg.

Exhibit A is the Same as Exhibit A to the affidavit of John D. Gregg appearing at page 90 of the certified transcript so is not repeated at this point. [297]

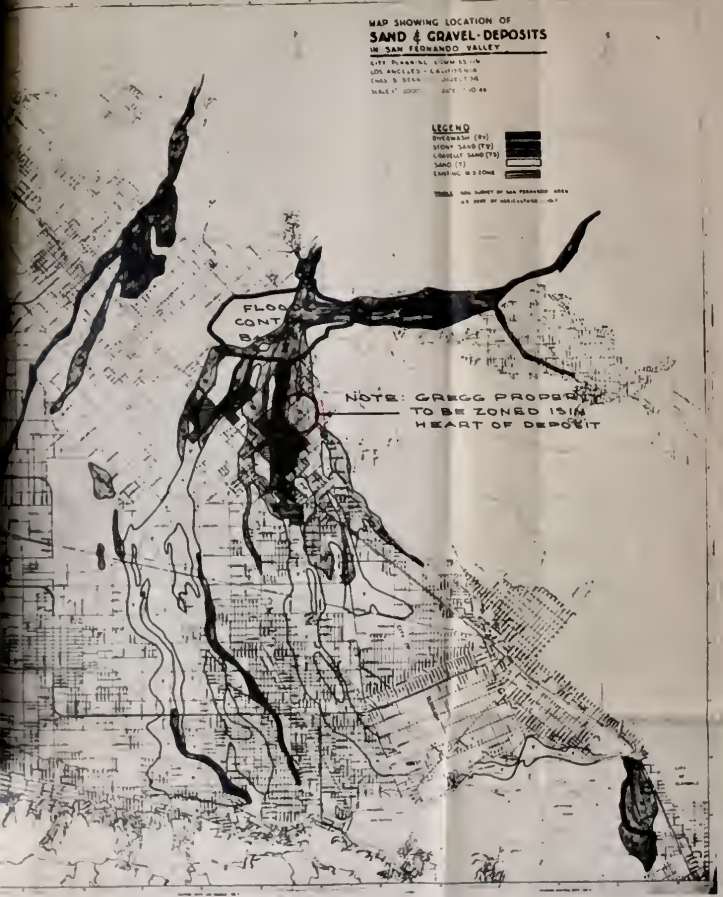

MAP SHOWING LOCATION OF
SAND & GRAVEL DEPOSITS
IN SAN FERNANDO VALLEY
LEGEND
FLOO
CONT
B
NOTE: GREGG PROPERTY
TO BE ZONED I2 IN
HEART OF DEPOSIT

EXHIBIT "B"

EXHIBIT "C"

EXHIBIT "C"

556

COMPUTED AVAILABLE TONNAGE ON 451 ZONED ACRES

PER DEPT. CITY PLANNING MAP EXHIBIT "C"

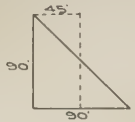
1. DEDUCTIONS must be made for slope loss to prevent slides and cave-ins. 10%

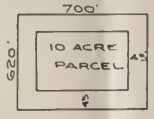
2. DEDUCTIONS must be made for Plant, Stockpiles and Shops 5%

   Total 15%

3. For purpose of computing tonnage a 15% deduction has been taken from "Gross Acreage".

4. ACTUAL LOSS, illustrated below shows this 15% deduction to be extremely conservative.





620' x 90' = 55,800 SQ FT
610' x 90' = 54,900 SQ FT
110,700 SQ FT =
2.5 AC OR 25%

5.

PARCEL	NET ACRES	MINEABLE ACRES AFTER 15% DEDUCTION Permanent Plants	No Plants Portable Plants	Industrial Property Asphalt & Railroad Trackage
A	20	—	17	—
B	—	—	—	—
*E	*29	19.5	—	—
G	95	—	77.0	—
K-1	40	—	—	—
K-2	11	71.8	—	—
K-3	40	—	—	—
I	45	—	34.5	—
M	19	—	—	16.2
N	6	5	—	—
D	—	—	—	—
H	45	—	36	—
**C	**13	—	—	—
J	12	8	—	—
O	5	5	—	—
L	20	5	—	6.8
F	—	—	—	—
P	—	—	—	—
Q	—	—	—	—
***R	38	***30	—	—
***S	3	*** 1.8	—	—
T	—	—	—	—
U	10	—	—	7
TOTAL	451.0	146.1	164.5	30.0
IN TONS EQUALS		29,220,000	32,900,000	6,000,000

OF THE 340.6 ACRES ONLY 310.6 ACRES ARE MINEABLE
TRANSLATED INTO TONS OF MATERIAL THIS IS:

Permanent Plants Have	23,000,000 Tons
Mixed Ownership Properties Have	6,220,000 Tons
Reserve Properties Have	32,900,000 Tons
	62,120,000 Tons
Industrial Areas Have	6,000,000 Tons
	68,120,000 Tons

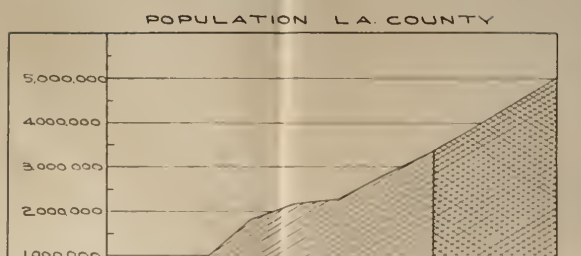
* Error shows 6 acres more in "Net Acres" than in Gross Acres. This has been added to the 15% deduction to correct.

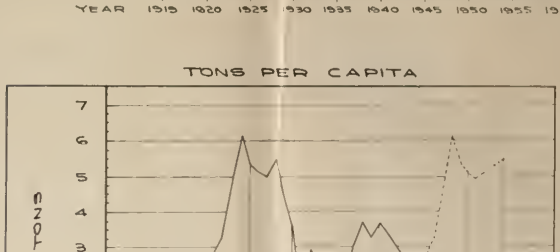
** 13 Acres as shown in "Net Acres" is the Plant Site for this exhausted parcel. Plant is being used to process material from parcel E.

*** Mixed Ownership Properties.

EXHIBIT "C-1"

MARKET DEMAND
ROCK AND SAND





Average population	1920 to 1929	1,[illegible],000
Average Tonnage produced	1920 to 1929	7,712,38[illegible] per year
Consumption per capita	1920 to 1929	[illegible] per year

Los Angeles population today is more than twice what it was in the 1920 - 1929 decade period, and by 1960 should be 2 3/4 times the population of 1920 - 1929 decade period, or nearly 5,000,000 people. Using the same consumption as in the previous decade period, there would be a total consumption of 17,000,000 tons per year or 8,500,000 to 9,000,000 tons per year more than the average of the decade.

EXHIBIT "D"

EXHIBIT D-1

TONNAGE AND POPULATION DATA

1917 to 1941 Taken from Report of Guy R. Varnum, Examiner
April 10, 1942

Year	L. A. County Population	Industry Sales	Per Capita Consumption in Tons
1917	875,000	1,430,939	1.65
1918	884,500	1,293,257	1.46
1919	910,477	1,132,096	1.24
1920	936,455	2,312,167	2.47
1921	1,086,408	3,000,000	2.76
1922	1,255,353	4,065,393	3.24
1923	1,378,685	7,032,608	5.10
1924	1,509,318	9,216,720	6.13
1925	1,864,733	10,000,000	5.37
1926	1,933,675	10,000,000	5.18
1927	1,996,507	10,000,000	5.00
1928	2,074,812	11,500,000	5.54
1929	2,196,195	10,000,000	4.56
1930	2,199,557	8,000,000	3.64
1931	2,240,208	4,000,000	1.78
1932	2,290,212	6,827,750	2.97
1933	2,280,234	5,366,341	2.35
1934	2,307,104	2,300,881	1.00
1935	2,309,372	2,850,300	1.40
1936	2,321,634	6,053,313	2.61
1937	2,366,904	7,358,924	3.06
1938	2,368,242	8,810,337	3.72
1939	2,500,000	8,288,186	3.32
1940	2,785,645	8,858,883	3.17
1941	2,860,000	9,815,796	
1942	2,942,000	Not available	Not available

Year	Population L. A. County	Sales Industry	in Tons Per Capita Consumption
1943	3,100,000	Not available	Not available
1944	3,225,000	Not available	Not available
1945	3,320,000	5,739,000	1.7
1946	3,420,000	10,000,000	2.80
1947	3,520,000		
1948	3,620,000		
1949	3,720,000		
1950	3,830,000		
1951	3,940,000		
1952	4,050,000		
1953	4,160,000		
1954	4,270,000		
1955	4,380,000		

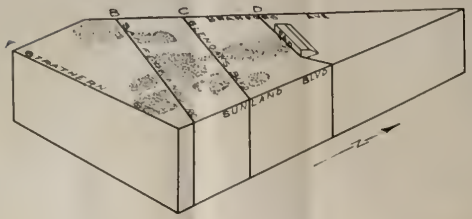
Note: Industry tonnages for years 1917–1936 both inclusive, excepting 1921 were taken from Lange Report; year 1921 estimated by the writer; years 1937 and 1938 were Lange Report figures plus 3.5 per cent; years 1939, 1940 and 1941 were estimates of Concrete Aggregates and Varnum for L. A. County, plus Consolidated Rock Products Company sales outside of county.

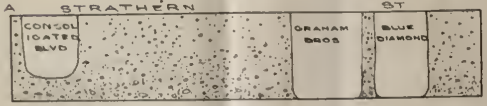
Industry tonnages for years 1942–1944 not available.

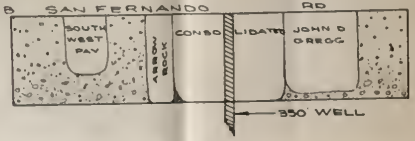
1946 Annual projection is on basis of July tonnage.

L. A. County population figures are from United States census for census years, and Chamber of Commerce interim estimates. Population estimates for 1946 to 1955 L. A. Planning Commission Estimates.

ROCK DEPOSIT
SAN FERNANDO







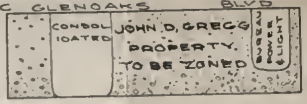


EXHIBIT "E"

526,880 TONS OR 6 MONTHS RESERVE REMAIN TO BE MINED BECAUSE

1 PRODUCTION CANNOT BE MAINTAINED OR INCREASED IF STOCK PILE AND PLANT ARE ELIMINATED HENCE PARCELS C & D CANNOT BE CONSIDERED AS RESERVE

2 INCREASED PRODUCTION NECESSITATES EVEN A LARGER STOCK PILE AREA

3 WATER AL RECOVERY FROM PARCELS A & B IS INADVISEABLE DUE TO THE NARROW SHAPE AS INDICATED BY "CROSS SECTION EXHIBIT "F"

EXHIBIT "B"

File No. 24473

To the Honorable Council
of the City of Los Angeles.

Your Planning Committee begs to report as follows:

In the matter of communication from the City Planning Commission relative to appeal of John D. Gregg from the decision of said Commission in denying his application for conditional use for the excavation of rock, sand, and gravel on real property in the San Fernando Valley bounded generally by Wicks Street, Dronfield Avenue and its southerly extension, Pendleton Street and Glenoaks Boulevard, more particularly described in said application, as amended, of said communicant to the said Commission and known as City Plan Case No. 962.

In accordance with provisions of the zoning ordinance, your Committee conducted a public hearing on this matter whereat proponents and opponents of the question were heard and although a considerable number of protests were filed, after careful consideration of all facts presented and a study of same, it is our opinion that the said use should be permitted.

We therefore Recommend in accordance with the requirements of the zoning ordinance that the Council make the following written findings of fact:

The Council finds that the findings of the City Planning Commission on which said Commission's

decision was based denying this application were in error for the following reasons:

1. That the property involved is situated in a district, the character of which is unsuited for residential purposes.

2. That the land in question is composed of gravel beds and is primarily suitable only for production of sand, rock and gravel.

(Stamped) October 2 - 1946

3. That the proposed use of this property is deemed essential to the public convenience and welfare and is in harmony with the various elements or objectives of the master plan.

4. That under the conditions to be imposed the proposed use would not be detrimental to surrounding developments and would not adversely affect individual property rights or interfere with the enjoyment of property rights of property owners in the vicinity or affect any legal right of such property owners.

Your Planning Committee begs to report as follows:

5. While there are about 450 acres of rock bearing land in M-3 zones in the area only 23,000,000 tons are available to existing plant facilities and this amount is not sufficient to meet public and private demand for rock aggregates.

We further find from the foregoing reasons that the public necessity, convenience, and general welfare require that this appeal be granted and the conditional use be permitted as requested subject to the following conditions:

1. That the applicant construct a 6-foot cyclone type mesh wire fence around the said property, in-

cluding barbed wire on the top of said fence providing the Fire Department grants permission for same.

2. That no permanent plant building or structure be installed or maintained on said property and that all material excavated be mined by an electrically powered shovel and primary crusher and transported by a conveyor belt system running through a tunnel or tunnels under Glenoaks Boulevard to the plant now owned and operated by applicant, lying southwesterly of said Boulevard and processed at said plant.

3. That a setback line of fifty feet from all property lines and existing streets be maintained and that slopes of excavations be maintained at one foot to one foot.

4. That the area between all property lines or street line and 50 foot setback be screen planted progressively as excavations proceed.

We Further Recommend that permission be granted to said applicant to make such excavations in Glenoaks Boulevard as may be necessary to install and house the necessary conveyor belts, such excavations to be made in accordance with specifications of and at the location approved by the Board of Public Works.

Respectfully submitted,

PLANNING COMMITTEE.

(Signed By) C. C. RASMUSSEN,
HAROLD A. HENRY,
J. WIN AUSTIN,

JFS/md
9/27/46 [307]

Received copy of the within Affidavit of Harold A. Henry and J. Win Austin on Behalf of Defendant City of Los Angeles in Opposition to Preliminary Injunction this 1st day of December, 1947.

OLIVER O. CLARK,
By /s/ M. BAILUS,
Attorney for Plaintiffs.

[Endorsed]: Filed Dec. 1, 1947. [308]

In the United States District Court, Southern District of California, Central Division

No. 7765—P. H.

HENRY WALLACE WINCHESTER, et al.,
Plaintiffs,

vs.

J. D. GREGG, and the CITY OF LOS ANGELES, a municipal corporation,
Defendants.

AFFIDAVIT OF LOUISE TAYLOR IN SUPPORT OF PENDING APPLICATON FOR PRELIMINARY INJUNCTION

State of California,
County of Los Angeles—ss.

Louise Taylor, being first duly sworn, deposes and says:

That she resides between the critical area described in plaintiffs' complaint herein and Wicks

Street described in said complaint and between said critical area and Glenoaks Boulevard as described in said complaint and has continuously resided at that place for more than two years last past; that she is familiar with operations which the defendant John D. Gregg has conducted at the northwesterly corner of Peoria Street and Glenoaks Boulevard since the grant to him of a variance permit on October 2, 1946, as set forth in the complaint herein, and that throughout the conduct of said operations large quantities of dust and dirt have arisen from said operations and have been transported therefrom to the said home of affiant and that the [309] same, together with the noise of said operations throughout the conduct thereof was most offensive and detrimental and very substantially interferred with the comfortable enjoyment of the home of affiant by herself and the members of her family.

Dated: December 3, 1947.

/s/ LOUISE TAYLOR.

Subscribed and sworn to before me this 3rd day of December, 1947.

/s/ DAVID D. LALLEE,
Notary Public in and for said
County and State.

[Endorsed]: Filed Dec. 4, 1947.

[Title of District Court and Cause.]

AFFIDAVIT OF H. B. LYNCH IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION.

State of California,
County of Los Angeles—ss.

H. B. Lynch, being first duly sworn, deposes and says:

That he is, and for more than 35 years continuously last past, has been a Civil Engineer engaged continuously in the practice of his profession in the State of California and that he is, and ever since the enactment of the California law for the registration of civil engineers in this state, has been registered as a Civil Engineer in the State of California.

That he is personally familiar with the land referred to as the "Critical Area" in the complaint on file herein and as to which the defendant John D. Gregg has been granted a permit by the City Council of the defendant City to excavate thereon for the production of rock, sand, and gravel; that affiant is familiar, also, with and [311] has personally examined all of the lands in the San Fernando Valley upon which such operations heretofore have been conducted; that the character and composition of the lands covered by said permit are such that in event a pit is excavated to a depth of one hundred feet or thereabouts on a slope of one vertical foot to each horizontal foot it is a practical certainty

that by reason of the natural processes of erosion the angle of said pit within a period of about twenty years will be substantially one and one-half feet horizontally for each vertical foot and that thereafter said angle will be flattened by natural processes to an angle substantially flatter than that hereinbefore stated; that by reason thereof it is a practical certainity that the excavation of such a pit which at surface is distant only fifty feet from a public highway, or adjoining property, will recede at surface until the edge of said pit will be substantially at the property line of said property.

Affiant further states that in addition to the foregoing the action upon such a pit, if dug upon said property, of surface waters which accumulate in that area periodically during periods of storm will cut deep gashes several hundred feet in length and from three to twenty-five or thirty feet in depth extending from the margin of said pit outwardly into and upon the properties adjacent thereto.

That upon the trial in the State Court of the action referred to in the affidavit of the defendant John D. Gregg on file herein before Honorable Alfred L. Bartlett, said defendant Gregg produced for and on his behalf a civil engineer named Raymond Hill who testified to the necessity of protecting any such pit dug upon said property against the influence of such accumulations of surface waters by the construction of a very substantial dike upon the margin of said pit and completely surrounding said pit, and that in the opinion of affiant the construction of such a dike would cost a minimum of $50,000.00. [312]

That since the first of this year a new rock, sand and gravel processing plant has been completed in the San Fernando Valley by Granite Materials Company and is now in operation for the commercial production of rock aggregates and the sale thereof to the trade and that the capacity of said plant is substantially equal to the capacity of the plant of said defendant John D. Gregg wherein he proposes to process materials from said "Critical Area."

That in August and September of 1946, before the Granite Materials plant become productive, said John D. Gregg shut down his plant for two months; that during that period no emergency arose in the rock business which could not be supplied by the plants remaining in operation.

That Exhibit "A-3" attached to the affidavit of John D. Gregg is a map purporting to show rock and gravel available to Gregg's plant; that said map shows only a portion of the property and omits entirely that portion of the property wherein is situated the greatest amount of available rock, sand and gravel.

Dated: December 4, 1947.

/s/ H. B. LYNCH.

Subscribed and sworn to before me this 4th day of December, 1947.

/s/ DAVID D. LALLEE,
Notary Public in and for
said County and State.

[Endorsed]: Filed Dec. 4, 1947. [313]

[Title of District Court and Cause.]

AFFIDAVIT OF ALBERT M. SCHEBLE IN SUPPORT OF PENDING APPLICATION FOR PRELIMINARY INJUNCTION

State of California,
County of Los Angeles—ss.

Albert M. Scheble, being first duly sworn, deposes and says:

That he is a licensed realtor under the laws of the State of California, and is and for several years immediately last past has been actively engaged in the conduct of a general real estate business in the San Fernando Valley in the City of Los Angeles, County of Los Angeles, State of California.

That he is personally familiar with the real property hereinafter described and has been familiar with said property for several years last past; that said real property is most excellently adapted to residential development and use and is, for more than one year continuously last past, has been of a reasonable market value of not less than $2500.00 per acre exclusively for residential development [314] and use, and that there was for a period of more than two years immediately preceding October 2, 1946, a substantial demand in the market for said real property for residential development and use, and that in the opinion of the affiant if the variance permit granted to John D. Gregg of October 2, 1946, is nullified there will be an immediate and substantial demand in the market for said land for residen-

tial use and development. That the conduct of operations for the production of rock, sand, and gravel upon said land under said variance permit will very substantially depreciate the market value and the actual value of the lands surrounding said property and situated within said community area and of the homes and improvements thereon.

Said real property is situated in the City of Los Angeles, County of Los Angeles, State of California, and is known and described as follows, to wit:

> Lots 1, 2, 4, 5, 6, 7, 13 and 14 in Block 19; the Easterly 150 feet of Lot 12 in Block 18; Lots 4 to 9 inclusive, and Lots 15 to 19 inclusive, and Lots 21 and 22 and the Westerly 280 feet of Lot 14 in Block 17 of the Los Angeles Land and Water Company's Subdivision of a part of the Maclay Rancho, as per map recorded in Book 3 of Maps, Pages 17 and 18, in the Office of the County Recorder of Los Angeles County, California.

Dated: December 3, 1947.

/s/ ALBERT M. SCHEBLE

Subscribed and sworn to before me this 3rd day of December, 1947.

[Seal] DAVID D. LALLEE,
Notary Public in and for said County and State.

[Endorsed]: Filed Dec. 4, 1947. [315]

[Title of District Court and Cause.]

AFFIDAVIT OF R. L. FARLEY IN SUPPORT OF PENDING APPLICATION FOR PRELIMINARY INJUNCTION

State of California,
County of Los Angeles—ss.

R. L. Farley, being first duly sworn deposes and says:

That he is a licensed realtor under the laws of the State of California, and is and for several years immediately last past has been actively engaged in the conduct of a general real estate business in the San Fernando Valley in the City of Los Angeles, County of Los Angeles, State of California.

That he is personally familiar with the real property hereinafter described and has been familiar with said property for several years last past; that said real property is most excellently adapted to residential development and use and is, and for more than one year continuously last past, has been of a reasonable market value of not less than $2500.00 per acre exclusively for residential development [316] and use, and that there was for a period of more than two years immediately preceding October 2, 1946, a substantial demand in the market for said real property for residential development and use, and that in the opinion of the affiant if the variance permit granted to John D. Gregg of October 2, 1946, is nullified there will be an immediate and substantial demand in the market for said land for residen-

tial use and development. That the conduct of operations for the production of rock, sand, and gravel upon said land under said variance permit will very substantially depreciate the market value and the actual value of the lands surrounding said property and situated within said community area and of the homes and improvements thereon.

Said real property is situated in the City of Los Angeles, County of Los Angeles, State of California, and is known and described as follows, to wit:

> Lots 1, 2, 4, 5, 6, 7, 13 and 14 in Block 19; the Easterly 150 feet of Lot 12 in Block 18; Lots 4 to 9 inclusive, and Lots 15 to 19 inclusive, and Lots 21 and 22 and the Westerly 280 feet of Lot 14 in Block 17 of the Los Angeles Land and Water Company's Subdivision of a part of the Maclay Rancho, as per map recorded in Book 3 of Maps, Pages 17 and 18, in the Office of the County Recorder of Los Angeles County, California.

Dated: December 3, 1947.

/s/ R. L. FARLEY

Subscribed and sworn to before me this 3rd day of December, 1947.

[Seal] MURRAY LEYTON,
Notary Public in and for said County and State.
My commission expires Jan. 29, 1950.

[Endorsed]: Filed Dec. 4, 1947. [317]

[Title of District Court and Cause.]

AFFIDAVIT OF JEANNE MOORE IN SUPPORT OF PENDING APPLICATION FOR PRELIMINARY INJUNCTION

State of California,
County of Los Angeles—ss.

Jeanne Moore, being first duly sworn, deposes and says:

That she resides between the critical area described in plaintiffs' complaint herein and Wicks Street described in said complaint and between said critical area and Glenoaks Boulevard as described in said complaint and has continuously resided at that place for more than two years last past; that she is familiar with operations which the defendant John D. Gregg has conducted at the northwesterly corner of Peoria Street and Glenoaks Boulevard since the grant to him of a variance permit on October 2, 1946, as set forth in the complaint herein, and that throughout the conduct of said operations large quantities of dust and dirt have arisen from said operations and have been transported therefrom to the said home of affiant and that the [318] same together with the noise of said operations throughout the conduct thereof was most offensive and detrimental and very substantially interferred with the comfortable enjoyment of the home of

affiant by herself and the members of her family.

Dated: December 3, 1947.

/s/ JEANNE MOORE

Subscribed and sworn to before me this 3rd day of December, 1947.

[Seal] MURRAY LEYTON

Notary Public in and for said County and State.

My Commission Expires Jan. 29, 1950.

[Endorsed]: Filed Dec. 4, 1947. [319]

In the United States District Court, Southern District of California, Central Division

No. 7765-P.H.

HENRY WALLACE WINCHESTER, et al.,
Plaintiffs,

vs.

J. D. GREGG, and the CITY OF LOS ANGELES, a municipal corporation,
Defendants.

REPORTER'S TRANSCRIPT OF EVIDENCE AND PROCEEDINGS ON HEARING RE PRELIMINARY INJUNCTION AND MOTION TO DISSOLVE THE SAME

The following constitutes a full and complete copy of the transcript of the proceedings in this matter before the above entitled court, exclusive of argument of counsel, offers of exhibits which were subsequently in evidence, and colloquy of

counsel. (Appropriate proceedings will be had to send up the original exhibits.)

The hearing commenced on December 8, 1947, and continued on December 12 and 16, 1947.

The Court: We will proceed with the hearing. If we finish it today, all right, if we do not finish it today we shall, at the conclusion of the day, make some determination about when and how we shall proceed further.

The parties have affidavits and briefs, [320] memoranda, responses and counter-affidavits and the like. I have read the affidavits—I will not say I have read all the briefs—but I have examined the points and many of the cases cited by the parties in connection with their different points on file, both the plaintiffs and the defendants.

I would like to say for the purpose of the record that last Thursday or Friday—I think it was last Thursday—I went out by myself and looked at the property. In order that you may have some idea where I went, I will give you my route.

I went out Glenoaks Boulevard to Pendleton Street and went south as far as I could go and turned around and went back up to Pendleton Street and went north as far as I could go until the street was blocked and turned around and went back. I went on Glenoaks again over to Peoria down Tujunga and around and back up Peoria to what appears to be Clybourn Avenue, then on over by the school—I do not know the name of the street that goes west there—and over down Sheldon Street clear to San Fernando Road; back again, back down

Glenoaks, up Wicks Street, back up to the property and up a street I think they call Art Street, up around to Sunland Boulevard and back again over the property. Then I went up Stonehurst to the foot of Hansen Dam and took another street and got lost and bought a canary.

So I am ready to proceed. (Rep. Tr. p. 9, l. 6 to p. 10, l. 9.)

At the conclusion of the proceedings on December 8, 1947, which consisted largely of argument, the following occured:

The Court: Excuse me just a moment, Mr. Crump. Mr. Westover telephoned me and said that he had an ex parte matter that he might want to interrupt me on.

(Short interruption for other court matters.)

Mr. Crump: What does your Honor desire us to do with respect to the matter under the circumstances?

The Court: I think that Mr. Clark is [321] entitled to represent his client before the Circuit Court of Appeals. They do not pay very much attention to us lower courts in this matter of fixing their calendars. They have fixed his matter for tomorrow morning, and in San Francisco, so I do not think that I can hold him here. If we do not finish this evening I will have to put the matter over until I can hear it and he can be here.

I have a case set for trial tomorrow morning. I haven't heard that it is not going ahead. Usually I get some indictaion if it is not.

Let me see the calendar, Mr. Clerk. It is set for three days. It probably would not take any longer than that. So I could resume the hearing on this matter Friday, and I would do so, even if I had not concluded this other case.

Mr. Crump: You will resume this when, did you say?

The Court: Friday. Tuesday, Wednesday and Thursday I allowed time to try this other case.

Mr. Crump: Your Honor please, this puts us in an awkward position. I am very much afraid that under Rule 65 there will be no liability on the bond after today. I realize your Honor has made an order that you will continue the restraining order in effect.

The Court: It will be in the same condition, of course. The restraining order is continued in force on the same conditions as heretofore.

Mr. Crump: But I don't think under the rule that your Honor has any authority—I am not objecting to what your Honor has done, if he had the authority it would be all right with me, but I am just afraid under the rule there is no authority to extend the restraining order beyond the present time and that therefore the bond would be in no effect.

The Court: If there would be no power to extend the restraining order, then I would have to go to the other alternative in order to preserve the status quo until I can decide this question and issue an injunction until further order of the Court. [322]

Mr. Crump: Even that I don't presume your Honor would do without any bond.

The Court: I will not issue any injunction without any bond.

I do not seem to find my Rules of Civil Procedure here.

Are you agreed, Mr. Clark, that Mr. Crump has stated the rule of law concerning supersedeas?

Mr. Clark: Definitely not.

The Court: You do not agree that he has?

Mr. Clark: Oh, no. The Supreme Court has reluctantly expressed its regret in cases that it couldn't do it, but it says it has no jurisdiction under the Constitution, and it begins way back in 15 Cal. I will just read to your Honor briefly——

Mr. Crump: Just a moment, Mr. Clark. I was discussing another problem, unless your Honor wants this stated at this time.

The Court: I am concerned about the power of the Supreme Court of the State of California, or the opportunity of the court which now has jurisdiction of another suit concerning the same subject matter here, to exercise its discretion on the matter of granting a stay until the matter can finally be decided.

Mr. Crump: Since this matter has to go over, wouldn't it be better to hold that whole argument over until we reconvene when both sides will be prepared to present it?

The Court: What makes you think that I have no power to continue this in force?

Mr. Crump: The provisions of Rule 65(b).

The Court: You mean that portion reading: '* * * and shall expire by its term within such time after entry, not to exceed 10 days, as the Court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period * * *'?

Mr. Crump: That would fix the power of the Court only for 20 days unless we consent, and we have consented only to the extension [323] up to the present time.

The Court: Certainly I do not think that the rule contemplated that the Court would be denied the power to pass on questions merely by exhaustion.

Mr. Crump: Oh, no, I don't think the Court is, and I certainly have no desire to interfere with the orderly processes of justice, but your Honor will recall that I took the position when we were up here before that this bond was inadequate, and I still think it is inadequate, and if it is going to be held up any great length of time longer I think the bond should be increased.

Without waiving our position at all, I suggest that the argument be put over until Friday.

The Court: There is sufficient showing before me that I can make another injunction until the further order of the Court, not under this temporary restraining order but an injunction pendente lite until the further order of the Court.

Mr. Crump: I don't question that, your Honor.

The Court: If there is any question about the power of the Court to continue this restraining order in force until Friday, until the matter can

be heard, why I shall direct the issuance of such an injunction, conditioned upon the same conditions as heretofore.

Mr. Crump: Let me state to your Honor that I am making this statement because I want to preserve all the rights we have under this bond. We are not consenting to any further continuance of the restraining order. However, if your Honor makes the order that you are going to continue it until the argument is concluded, we are not going to violate it.

The Court: You expressed a possibility that the provisions of the bond would be invalid if it were carried forward.

Mr. Crump: I will have to take chances on that.

The Court: It is not my intention that a restraining order should be put in force here without some bond. [324]

Mr. Crump: That is my position, your Honor.

The Court: And in view of your suggestion of that possibility I think you should be protected by a bond at all times. If that is the case I will now make an order continuing the hearing of your motion to dismiss—I will deny your motion to dissolve the temporary restraining order, I will grant the motion for an injunction until further order of the Court, conditioned upon the same conditions as that heretofore indicated, not only in the terms of the written injunction but as well in the terms of the oral statement which I made the last time the matter was up here, to wit, that the injunction would not be effective south of Glenoaks Boulevard unless and until an additional bond of $10,000 was deposited.

Mr. Crump: Then I take it that a bond will have to be put on the preliminary injunction that your Honor is now granting?

The Court: That is correct. A bond will have to be deposited. A new bond will have to be deposited and the injunction will have to be drawn. I will continue all of your motions in connection with the matter and I will also deem your motion to dissolve the temporary restraining order as having been made as a motion to dissolve the temporary injunction.

Mr. Clark: We stipulate to that. (Rep. Tr. p. 151, line 14 to p. 156, line 25)

The Court: We are here discussing the motion to dismiss and the motion for a temporary restraining order and your motion to strike.

Mr. Crump: And the motion of plaintiffs for a preliminary injunction.

The Court: Yes. Well, the motion of plaintiffs for a preliminary injunction, which now takes the color and complexion of a motion to dissolve the present injunction, but it is being [325] heard as if it were a motion for a preliminary injunction.

Now, in the course of your statement this morning you said that if the action was not dismissed this Court had the power to stay it. Am I to understand that you are moving for a stay in the alternative?

Mr. Crump: I am not moving for a stay in the alternative.

The Court: Very well.

Mr. Crump: Just a moment, if the Court please—it is my opinion that the greater includes

the lesser, and that without a formal motion to stay, if this Court concluded that it should not dismiss, it would have the power to stay and, in fact under the authorities, as I see it, it would be the duty of the Court to do so. I believe the Court could do that sua sponte without any formal motion to that effect.

Now I would like to pass to the next matter.

The Court: Excuse me again. Before we conclude I would like to have Mr. Gregg called to the stand as I want to ask him a few questions.

Mr. Crump: Yes, your Honor.

Now I want to discuss this proposition, the expediency of the granting of the permit to Mr. Gregg is a question for the Council and is not subject to judicial review.

(Rep. Tr. p. 224, line 19, to p. 225, line 25.)

JOHN D. GREGG

called as a witness, was examined and testified as follows:

The Court: Mr. Gregg, it appeared from some of the affidavits that on some of the parcels of land included within your exception to the zoning ordinance there was a previous excavation by the Bureau of Power and Light. I have forgotten the particular parcel of property it is on by legal description. Do you know the depth [326] of that?

The Witness: Well, that was not within this permit area but across Pendleton.

The Court: It is immediately adjacent?

(Testimony of John D. Gregg.)

The Witness: It is immediately adjacent, and I can approximate it. I would say that the deepest portion of the excavation is probably around 50 to 60 feet.

The Court: Fifty to 60 feet?

The Witness: Yes.

The Court: How deep is your excavation south of Glenoaks?

The Witness: We average about 100 feet.

The Court: Why don't you go deeper?

The Witness: The material is too soft.

The Court: The material?

The Witness: The rock becomes soft and it will not meet the specifications. There is a very clean line of demarcation between the softer materials.

The Court: In other words, the fill is the first 100 feet, that is the gravel bed, is the first 100 feet?

The Witness: The gravel goes on down but it becomes decomposed at that point.

The Court: I see. So that the maximum depth of the deposit is approximately a hundred feet over the whole wash?

The Witness: That is correct.

The Court: Now in the event that there had been no legal proceedings, what had been your plan of excavation north of Glenoaks, that is to say, would you excavate each portion a total depth of a hundred feet as you excavated from the surface, or was it your plan to have excavated, say, 25 feet and then take the next 25, and so forth? How do you work that?

(Testimony of John D. Gregg.)

The Witness: There are two reasons for excavating your full depth. [327]

The Court: I am just asking what your plan was.

The Witness: My plan was to go the full depth, for which there is a very good reason.

The Court: As you progress?

The Witness: That is right.

The Court: Well, now, at your little elevator plant under the boulevard there——

Mr. Crump: Conveyor belt, your Honor.

The Court: ——conveyor, that is only about 25 feet below the surface, isn't it?

The Witness: It is about 12 feet.

The Court: About 12 feet?

The Witness: Yes, sir.

The Court: And your plan comprehended that you should excavate back of that and lift to that?

The Witness: We will go down with that conveyor on a slope of about 3½ inches to the foot until we reach our maximum depth, and then we will carry on to our maximum depth.

The Court: Now, what is your reason for excavating at your maximum depth as you go along?

The Witness: Well, there are two reasons for it. The first reason is the economics of it. You would make one cut and you take your entire product.

The major reason for doing it is the difference in the grading of the material. The material is all placed in there with water, your stratas may be anywhere from an inch or so in thickness, the

(Testimony of John D. Gregg.)

stratas of sand, and the stratas of course rock and boulders, and in some cases you may have some deleterious material, but you get a complete grading of your material from the top of the bank to the bottom.

Now your bottom sands are much coarser than your top sands and you need the finer in the top to mix with your coarse sand [328] on the bottom in order to stay within the specifications.

The Court: How far would your estimate be back from Glenoaks from your excavation within a period of a year?

The Witness: How much will I excavate during that time?

The Court: How many linear feet back north from Glenoaks?

The Witness: In cubic content the excavated area per acre, there is about 268,000 tons. I will excavate approximately a million tons in a year. In other words, approximately four acres in total.

The Court: Per year?

The Witness: Yes. Now, there is in that area north of Glenoaks——

The Court: Do you have another map on a smaller scale showing his property? There was one in the file, or you had one, I believe.

The Witness: There is a smaller picture in the file.

Mr. Dunne: You mean the aerial map we had here?

The Court: Just showing his property to a smaller scale than this map here.

(Testimony of John D. Gregg.)

Mr. Clark: The map first on the board, your Honor, will show it.

The Court: I think probably that is it. Yes, that is it.

Will you step down there, Mr. Gregg?

Your conveyor under the street, that is a requirement of the permit from the City, isn't it?

The Witness: That is correct.

The Court: And that is located where? Point that out.

The Witness: Right here. (indicating)

The Court: What was your plan of excavation, assuming that there had been no interruption by litigation or otherwise?

The Witness: Well, if your Honor will remember, at the time you were out there, if you looked at this, the conveyor comes [329] straight across Glenoaks and there is a junction point about 60 or 70 feet out from the end of the tunnel. At that point we are turning the conveyor. If we continued this we would go out in this line here. (indicating) But we are turning that conveyor and coming down in this direction, going practically parallel to Peoria but at a slight angle away from it, so that at the time, if this point here were too close to have approached our maximum depth, I believe that around 600 feet from Glenoaks we will be down at our maximum depth and at that time we will be at least 200, possibly 250 lineal feet from Peoria. That will continue on out——

The Court: Westerly?

(Testimony of John D. Gregg.)

The Witness: ——westerly, slightly westerly—it is almost due north in direction, as a matter of fact, due to the way the streets run—but continue at an angle slightly away from Peoria until such time as the conveyor is——

The Court: In a line with those lots?

The Witness: It will be 350 feet from Peoria. In other words, from this point here we will continue out on that slight angle until we are 350 feet away from Peoria Street, at which time we will then turn and parallel Peoria in order to get our maximum width in our cut.

The Court: How big a space there would four acres take, or a year's operations?

The Witness: These lots here are five acres, between this line here. (Indicating)

The Court: How wide were you going to make your cut?

The Witness: The cut will be, when you arrive at your maximum depth, about 400 feet wide at the toe.

The Court: Then a year's supply would take you with a 400 feet wide strip quite a way up that street? [330]

The Witness: Your original cut when you first start down at 12 feet, there is substantially no tonnage at 12 feet, and you make distance quite rapidly at that shallow cut. I haven't computed the tonnage that we will excavate at the time we arrive at our maximum cut, but once we arrive at the maximum cut we then have somewhere around 268,-

(Testimony of John D. Gregg.)

000 tons per cubic acre excavated, or per square acre excavated at the 100 feet.

The Court: What I am trying to get at is this: What would happen within two years, assuming no restraining order were granted? Where would you be? What would the condition of that land be out there?

The Witness: My maximum excavation at the end of two years will be not to exceed 2 million tons.

Mr. Crump: He wants to know what area you would cover.

The Court: That doesn't mean anything to me, 2 million tons.

The Witness: That would be about eight acres.

The Court: On your present plant, just take a little pencil mark and draw around at the end of two years about what you would have excavated.

Mr. Crump: Mr. Gregg, I think what the judge wants is to have you mark the square area which you would have excavated.

The Court: In other words, at the end of that one year, going along that street there, you would have the easterly half of those two 5-acre lots cut in one year's operations?

The Witness: I beg your pardon?

The Court: In other words, at the end of one year you would have approximately the easterly half of those two 5-acre lots, that is, 2½ acres and 2½ acres?

The Witness: We might exceed that at the end of one year. I was trying to just get a rough approximation of the cut until I get to my maxi-

(Testimony of John D. Gregg.)

mum depth and then I was just sketching it in here as to what the maximum cut likely would be, and I would say—this is an approximation—that it would approximate something more [331] or less like I have diagrammed here.

The Court: With a gradual slope from Glenoaks on down to the maximum depth there?

The Witness: That is right; 50 foot burrow and a 1 to 1 slope will be maintained on the other sides.

The Court: That Bureau of Power and Light excavation with a maximum depth of only 50 feet, that is pretty gradual I notice from all of the edges. Is there any particular reason for that? I mean, couldn't they get the gradation of the sizes involved in that pit?

The Witness: Your gradations in your first 50 feet are better than they are from there on down. You can operate your top along quite successfully, but after you strip the top off where you run into difficulty is in your lower excavation. You need the blend of that top with the lower.

The Court: You mix the top with the bottom?

The Witness: That is right.

The Court: Suppose that you were restricted in your operations to a maximum depth of 30 feet, what would be the effect? In other words, you could get all of the grade you require within that 30 feet.

The Witness: That is true, but you might likely destroy the usefulness of that material below the 30-foot because your top 30 feet is your hardest

(Testimony of John D. Gregg.)

material, as well as your fine material, and you would most likely put the material outside of the standard specifications.

Now that question I can't—as to the hardness I couldn't tell you exactly what that hardness is until I am excavating—but that has been all our experience, that unless we take out full cut we cannot stay within the specifications.

There is one plant that is operating differently and he has had no end of trouble with that type of operation. [332]

The Court: Have any of those excavations that have been made in the Valley ever been filled?

The Witness: Well, we have refilled quite a portion of our present pit in here; Consolidated have refilled quite a few million tons in this area here.

The Court: What do they refill it with?

The Witness: Well, waste material, some waste from their own plant. I have refilled with dirt and broken concrete, generally waste from excavations.

The Court: Waste from excavations? You mean, for instance, street excavations?

The Witness: Street excavations—there is just no end to the different things. I have been very careful not to put any material in there that would burn or would shrink. I have taken only solid material into my pit, and I know that I must have had from outside sources several million tons in the last 10 or 12 years.

The Court: In the refilling of those excavations, what is the general course of business with relation

(Testimony of John D. Gregg.)

to this point? Do you have to buy the refill or does the person who is digging the place pay you to have a place to dump it?

The Witness: They pay us to have a place to dump it. I have received varying amounts from different contractors depending on whether I wanted it.

Now in one case I actually wanted some of the material and let them in at a very nominal price. Other times the privilege of dumping is more valuable than the original excavation. It is substantially so on the pits in old Alameda Street, the Blue Diamond pit and the Consolidated pit. They are more valuable than they were originally at the time they were excavated.

The Court: That is for dumping purposes?

The Witness: Yes.

Mr. Crump: After they are filled they are more valuable, you mean? [333]

The Witness: They are more valuable as a hole for the purpose of filling.

Mr. Crump: H-o-l-e; I see.

The Court: Alameda Street is valuable because the industrial district has come around there?

The Witness: Yes, but there will shortly be an end to that. The Los Angeles By-Products Company would lease my present pit in a minute if I would lease it to them for the purpose of dumping ashes. After they process their product they get the tin cans and all the metal out and have considerable ashes left, and they are now seeking a

(Testimony of John D. Gregg.)

place, additional property, and Mr. Clarence Gregg—who is no relation of mine—told me that he could see the day not too long distant when we might be hauling debris out to sea by barge the same as they do in New York and dumping it for lack of a place to dump it.

The Court: Do you know of any pit excavated in the Valley which has ever been filled and then had dirt put on top of it?

The Witness: No I do not. I don't believe that any of them as yet have been completely refilled.

Mr. Crump: May I ask a question—pardon me.

The Court: Go ahead.

Mr. Crump: I wanted to ask, right on that point, if there is any reason why it couldn't be refilled and dirt put on top of it.

The Witness: None whatsoever.

Mr. Crump: I then would like to state that we are willing to stipulate that if he excavated pending the outcome of this case, the state court case, either one, that we will refill if the judgment should be against him in the case. We make that offer of stipulation.

Mr. Clark: I couldn't stipulate to that because we know that it is a practical impossibility. Of all the hundreds of acres of pits in Los Angeles County, none has ever been refilled excepting [334] the one down there in the heart of the Alameda district. There are hundreds of acres of unfilled pits in the San Fernando Valley now.

(Testimony of John D. Gregg.)

Mr. Crump: I think the Court can take judicial notice of the physical fact that a pit can be refilled.

Mr. Clark: With what? Mr. Gregg has been using concrete crates from the war period, from the airplane industry, to fill with. You can see them laying there on the banks.

The Court: I was wondering what those things were.

Mr. Clark: That is what they are.

Mr. Crump: We make the offer anyway.

The Court: You make the offer to stipulate?

Mr. Crump: Yes.

The Court: What is your investment in machinery and equipment in place? That is to say, in the pit, excluding mobile equipment such as trucks but not excluding mobile equipment that you use in the pit?

Mr. Crump: That is physical plant and equipment?

The Court: That is the physical plant.

The Witness: You are referring to the plant itself as well as the pit operation?

The Court: I am referring to the plant and the diggers and the shovels and the conveyor.

Mr. Crump: Everything except the trucks.

The Court: The crushers and the bins, the elevators, and so on?

The Witness: I haven't the breakdown exactly in my mind.

The Court: Just roughly.

The Witness: My total investment is somewhere around a million dollars, and the breakdown on

(Testimony of John D. Gregg.)

that, the trucking equipment would run somewhere around $150,000 to $200,000.

The Court: The greater portion roughly of your investment in equipment in place is around a million dollars? [335]

The Witness: Including trucks. I could point out to you that this shovel alone here is worth to exceed $100,000. The conveyor system going across to this point will approximate some $75,000 or $80,000. That is new conveyor equipment.

The Court: Under the terms of the permit you were required to keep your crushing and grinding bins south of Glenoaks, are you?

The Witness: I have everything south of Glenoaks with the exception of the shovel and the primary jaw crusher which follows the shovel. I am required to house that. In my present operation it is not housed.

Mr. Crump: That was by a court order?

The Witness: That is right. We agreed to that.

And at the time I move across there I must house that crusher, when I move the crusher over there.

The Court: What I am trying to get at is in the operation of this property, in the excavation of it, is it the requirement of the council exception that you shall keep all of that physical equipment that now exists south of Glenoaks, south of Glenoaks? In other words, do you have to bring all of your rock and everything down there to segregate it?

The Witness: That is correct.

(Testimony of John D. Gregg.)

The Court: You have to bring it all up through that tunnel?

The Witness: That is correct.

The Court: So that the only physical machinery operating north of Glenoaks will be the shovel, the housed crusher and the conveyor?

The Witness: And a dragline to rake the bank. There will be a dragline. That will be the only equipment above the surface of the ground, will be an electric dragline, and in the pit itself will be the shovel, crusher and the conveyor system.

Mr. Crump: And may I ask, you are required to wet down the banks? [336]

The Witness: That is right.

The Court: When you use the dragline?

The Witness: That is right.

Mr. Clark: Your Honor has in mind not by the terms of the permit?

The Court: That is by the terms of the decree.

Mr. Crump: The housing of the primary crusher and the wetting down of the banks are additions made by the decree of the Superior Court, so to that extent they constitute in effect an injunction regulating the operations.

The Court: What I am getting at, it is the present conditions of his operation. In short, if I understand you correctly, under the present conditions you will have no physical plant operating north of Glenoaks Boulevard except the digging equipment.

The Witness: That is correct.

The Court: The digging and conveying equipment.

(Testimony of John D. Gregg.)

Mr. Clark: And the crusher, your Honor.

The Witness: And the primary crusher.

The Court: The primary crusher is a mobile unit?

The Witness: It is on railroad wheels and rails.

The Court: Which follows your digger?

The Witness: Yes, it is movable equipment.

The Court: That is all I have.

Mr. Clark: May I, your Honor, make this suggestion in view of Mr. Crump's suggestion? There is no prohibition in this permit against the maintenance of stockpiles northerly of Glenoaks Boulevard or on the permit area.

Mr. Crump: There is no purpose of having stockpiles up there where it would be uneconomic.

The Court: Let me ask Mr. Gregg another question. Your material is received and put through the primary crusher?

The Witness: Yes, sir. [337]

The Court: Where is it segregated into sand and gravel and rock of the different sizes and brands?

The Witness: After it gets to the plant west or southerly of Glenoaks. There is no place to stop this material in the way we have our plant laid out once it starts moving. It is only a matter of minutes until it crosses Glenoaks Boulevard, at which time it goes into a large surge pile, the tuner for which is in, the steel work, the truss for the conveyor is in, the whole application of equipment

(Testimony of John D. Gregg.)

is there where it can be seen in exactly the way we intend to operate. We do not intend to, and it would not be a practical thing to do, to have a surge pile north of Glenoaks Boulevard.

The Court: A surge pile is what? What do you mean by that?

The Court (The Witness): This material is discharged off the conveyor coming under Glenoaks Boulevard at an elevation about ground level, or slightly above ground level. The tunnel under that stockpile is approximately a hundred feet below that, so that this surge pile it is discharged into will have a varying depth.

The Court: The surge pile is simply the rock after it goes through the primary crusher, is that what you mean?

The Witness: All the material is still together in one big pile.

The Court: In other words, you dig it, put it through the primary crusher, take it in the conveyor, pile it up and then you have another conveyor that takes it to the segregation plant?

The Witness: That is correct. And that is done primarily to segregate the operation so that the digging operation north of Glenoaks has nothing whatsoever to do with the plant itself. The only thing that it does, it replenishes this stockpile.

The Court: I see. I have no other questions. (Rep. Tr., p. 250, line 24, to p. 267, line 10.) [338]

(Testimony of John D. Gregg.)

Defendant, J. D. Gregg, recalled as a witness in his own behalf, was examined and testified further as follows:

Q. (By Mr. Crump): Now, Mr. Gregg, will you explain the drawing to the Court?

The Court: Have you seen this, Mr. Clark?

Mr. Clark: Yes, I did, your Honor. Counsel showed it to me this morning.

The Witness: This is Glenoaks Boulevard, and at the lower part of the drawing is Peoria Street. Now the tunnel across the intersection is denoted by this line coming through here. This point is the intersection of the conveyors. At the present time the large shovel is in here adjacent about 40 or 50 feet from this intersection point.

Now the tonnage computed from the station 0 plus 48, which is this point here, to station 3 plus 98—and it would be about six feet beyond that—at which point we are 100 feet in depth. The tonnage computed here is 379,500 tons.

At this point we have gone down 3½ inches to the foot. We are a hundred feet in depth. This conveyor goes out of the same angle and we call it Junction A. At Junction A we start paralleling Peoria Street. The tonnage to Junction A is 1,593,000 tons and it is necessary to go 141 feet beyond that point or 2,000,000 tons.

The blue shading indicates the sloping of the bank, that is a 50-foot berm here, the slope of the bank; this is a roadway into the pit itself and the slope of the bank is on this side.

(Testimony of John D. Gregg.)

This drawing was made some time ago for the purposes of getting our exact slope and the slope of the conveyor, the elevation of the conveyor and the slope of the banks.

The Court: Plotting your operations?

The Witness: Plotting the operation. I had my engineers [339] calculate the tonnage so I would know exactly what I was talking about.

The Court: And this blue shaded area——

The Witness: That is the slope of the bank. It is 1 to 1.

The Court: 1 to 1?

The Witness: 1 to 1. You will notice it widens out here on account of this roadway going down.

The Court: Yes, I see. Very well.

Mr. Crump: You may take that map with you, Mr. Gregg.

(Witness excused.)

(Rep. Tr., p. 307, line 2, to p. 308, line 19.)

The Court: This is the time when I announced I would be ready to make some decision in connection with the matter. It would be desirable, in instances like this where counsel have been assiduous and energetic and have filed long briefs and made great preparation, if time would permit the filing of a written opinion. But I think it is more important, on injunction matters such as this, that as soon as I have come to a conclusion I should announce the decision without giving myself the pleasure of writing a long opinion which would be reported in

the textbooks and perhaps referred to by subsequent lawyers and subsequent judges.

In doing so, of necessity I have not had the time to do more than just barely outline my views. I will try and state them, and if there is any point which has been made by either counsel which is overlooked, if you will call my attention to it I will indicate my views on that particular subject, but I do not think that that will be necessary.

The first thing to decide in connection with this matter is whether or not the motion to dismiss is well taken, because if the motion to dismiss is well taken, of necessity, any application for a preliminary injunction would fall, and [340] the motion to dissolve it would automatically be granted.

In considering the question on the motion to dismiss, the first thing to determine is whether or not there is a Federal question. Obviously there is no diversity of citizenship alleged or apparent in the proceedings. It is certainly not apparent from the complaint on file in the matter.

But, as I view the authorities, it is not necessary that there be diversity of citizenship in a case raising a constitutional question concerning any action by a state or any of its agencies of government. If there is any doubt about that, I think the question was settled by the Supreme Court in the case of Raymond v. Chicago Traction Company, 207 U. S. 20, at page 35.

There is no doubt but what the city and the city government, the city council and all of its agencies, are agencies of the state. That question is settled

by Home Telephone Company v. City of Los Angeles, 227 U. S. 278, where action by the city council was under assault on the ground that it violated the due process clause and I believe the contract clause of the Constitution, and the Court held that the city was an agency of the state and that the constitutional question was properly raised in that case.

But because it is an action of the state does not necessarily bring it within the provisions of 28 U. S. Code, Section 380, requiring a three-judge court, but is action which may be reached otherwise under the authority of such cases as Rorick v. Commissioner, 307 U. S. 208, Ex Parte Collins, 277 U. S. 65 and Re Everglades, 293 U. S. 52. That such action is sufficient to permit the invocation of any constitutional rights under the Fourteenth Amendment is definitely held by Home Telephone Company v. City of Los Angeles, 227 U. S. 278; Raymond v. Chicago Traction Company, 207 U. S. 20; Dobbins v. City of Los Angeles, 195 U. S. 223, and Ex Parte Young, 209 U. S. 123, as I read them all. [341]

The defendants make the contention that the assertion in the plaintiffs' complaint that the action of the City is void as being an excess of their authority under either the charter or the state constitution or any state statute is, in my judgment, not sufficient to take away the jurisdiction of this court on the constitutional question, as the defendants contend was the holding Barney v. City of New York, 193 U. S. 430, and as was the holding in the Barney case. But as I indicated during the course of the argument I think that the Barney case is not appli-

cable here but that the doctrine outlined in Home Telephone Company v. City of Los Angeles, 227 U. S. 278, and in Snowden v. Hughes, 321 U. S. 1, is the prevailing doctrine. Incidentally, in both of those cases they severely criticize the Barney case.

In the Home Telegraph case the Court, in reviewing, for instance, the Raymond v. Chicago Traction Company case and several others, along with the Barney case and Ex Parte Young, went on to call attention to the fact that in the Raymond v. Chicago Traction Company case it:

> "concerned the repugnancy to the Fourteenth Amendment of a reassessment made by a state board of equalization, and the suit was originally commenced in a Federal Court. It was pressed that as the claim of the complainant was in effect that the board in the reassessment had violated an express requirement of the state constitution, in that the board had 'disobeyed the authentic command of the state by failing to make its valuations in such a way that every person shall pay a tax in proportion to the value of his property,' the act of the subordinate board could not be deemed the act of the state. This contention was [342] held to be unsound, and it was decided that even although the act of the board was wrongful from the point of view of the state constitution or law, it was nevertheless an act of a state officer within the intendment of the Fourteenth Amendment. It was pointed out that, as

> the result of the enforcement of the reassessment would be an assertion of state power accomplishing a wrong which the Fourteenth Amendment forbade, the claim of right to prevent such act under the Fourteenth Amendment 'constitutes a federal question beyond all controversy.' "

The Court then goes on and quotes similar provisions from previous cases.

So I think that if the complaint otherwise meets the test of what constitutes a statement of a cause of action, it should not be dismissed on the grounds that I have indicated.

I wish to make it clear that in so holding I do not feel that it is within the power or the duty of this court to pass on any of what we have referred to in the course of the argument as the "state questions." They are and must be left for decision by the state court. So that as to whether or not the complaint states a cause of action simmers down to whether or not, disregarding those state questions, the complaint is good.

I realize of course the offered plea of the doctrine that every intendment for the validity of the exercise of the police power should be made. But in view of the allegations in the complaint concerning the some 20-odd years or thereabouts of having this property zoned in the residential zone area, the fact that the plaintiffs in this case have built their homes during that period of time and invested a [343] large sum of money, that in the meantime they have

paved their streets, been included in bond issue districts for the development of parks and the like, and in view of the allegation in the complaint that the defendant Gregg recently purchased this property and did so while it was still zoned for residential purposes, it seems to me that just pointing those out as a few of the things, and certainly by no means summarizing all of the allegations in the complaint which I think make it good, in view of those general allegations and the others contained in the complaint that it does state a cause of action under the Dobbins case and under the Jardine case.

It was in the case of Jardine v. City of Pasadena, 199 Cal. 64, that the Supreme Court of the State of California announced the doctrine—and I feel as though it is binding upon me—that a person who is not immediately affected as to a particular parcel of property on a zoning ordinance, or an ordinance of a city, has a right to come into court and can state a cause of action concerning the action of a city in zoning or permitting the establishment of some industry or business on property adjoining his or in that vicinity.

So I think not only do they state a cause of action, but under the Dobbins case and under the Jardine case the plaintiffs here are in court, and properly so.

As to the Dobbins case, I cannot see any difference in principle—that Dobbins there was the person who got the zoning in his favor and expended money and these plaintiffs here in whose favor the zoning was and on that basis they expended money

for the purpose of their homes—I think the principle is the same, and the Dobbins case I would regard as authoritative for stating a cause of action under the facts outlined in this case, and it is also authoritative on the [344] proposition that a city can be estopped by the application of the principles of equitable estoppel to an action of the city in connection with the building of buildings or the use of property depending upon some action of the city.

On the question of comity, that the state court already had jurisdiction and that this court must not interfere, if the Supreme Court of the State of California had the power under the decisions to issue a writ of supersedeas—not whether they would or would not, or whether they should or should not, but if they had the power to issue a writ of supersedeas—then I think that the doctrine of comity would require this court to decline jurisdiction, because if they had the power to issue a supersedeas then the question as to whether or not the action of the city in granting the permit to Gregg was a violation of the plaintiffs' rights, or the residents in that area and their rights under the Fourteenth Amendment, could be preserved and the parties held in status quo until such time as the Supreme Court of the United States would have the opportunity to determine whether or not there was a violation of the Fourteenth Amendment in this action of the city.

Under Pennekamp v. Florida, 328 U. S. 331, and other cases—this case appears to be the latest one on the subject—the Supreme Court is the final arbi-

ter on the question of whether or not the Federal Constitution is violated. There the court said, at page 335:

> "The Constitution has imposed upon this court final authority to determine the meaning and application of those words of that instrument (that is, the Constitution) which require interpretation to resolve judicial issues."

And there are other cases along the same line.

So that there being no power in the state Supreme Court to preserve this constitutional question which I think the plaintiffs have raised and under their complaint have stated a cause of action for violation of the Fourteenth Amendment, that being so I think that under the doctrine of comity I should not decline jurisdiction but should, in view of the fact that there is jurisdiction under the complaint, retain jurisdiction so that this constitutional question can be preserved for final decision by the Supreme Court of the United States in the event that the matter is not otherwise disposed of by the State Supreme Court in connection with the questions which are raised and which do not involve the Constitution of the United States. For instance, the state court might decide the state questions, as I refer to them, against the defendants in the state action, and if that were true it would never require a decision on the Fourteenth Amendment. But the plaintiffs here are entitled to have that question preserved.

Some question was raised that these plaintiffs here were bound by the class suit and that they

could not shop around for a forum. If they were bound by the class suit filed in the Superior Court, I would say that under the doctrine that the litigants cannot merely shop around for a forum, that would be true. But as I read the complaint, these plaintiffs here did not join in the class action filed in the state court, and as I view the cases and the law in that respect, the class action is binding upon only those who take advantage of the class action by indicating in one way or another, either joining in the suit or taking advantage of the fruits of the suit in the event there are any fruits of such suits, that they desire to be bound. From the pleadings in this case it does not appear that that is true here. [346]

Another point was raised, that the right of the defendant Gregg to take his rock from his land could not be affected by the filing of this suit and would entitle the defendants here to a dismissal of the action. As I suggested this morning to counsel, in order for me to hold with them on that ground I would first have to hold the general zoning ordinance and all the previous zoning ordinances of the city which placed this site here in other than the permissible zone for rock crushers to be void and unconstitutional.

The other point that I think was raised was that the defendant Gregg was not a proper party, but as I read United States v. Classic, 313 U. S. 299, and as I quoted it to you the other day, I believe that he is a proper party because the defendant Gregg would not be in there operating now if he

did not have the permit from the city. In other words, it is the city action which gives the defendant Gregg's right to mine rock their vitality and give them life. Otherwise he might have some in court rights existent but he would not have the right to do anything, and it is by virtue of the city that the defendant Gregg is able to go in there and to mine rock upon this land. For that reason I think that Gregg is a proper party to the suit, and for the reasons that I have indicated I think that the complaint states a cause of action and should not be dismissed. Therefore the motions to dismiss on behalf of the city and the defendant Gregg are both denied.

The question next arises as to whether or not there being a cause of action stated in the complaint the preliminary injunction should be granted or, as stated in its present light, the motion to dissolve the preliminary injunction should be granted.

As I have indicated, or as counsel can see from my remarks, [347] I feel that the constitutional question has been raised sufficiently so that it should be preserved in order to enable the Supreme Court of the United States to pass upon it. I think it would be wrong to proceed with this case and decide that question independently of the proceedings in the state court, because the state court might grant the relief requested by the plaintiffs in that case and deny the rights to Gregg, in which event, if the rights were denied to Gregg, then of course this action would be abated because the plaintiffs here, while different plaintiffs, seek the same relief that they seek from Gregg.

It is true that the damage to the plaintiffs is great and irreparable. The testimony of the defendant Gregg to the effect that in the next two years he would dig out an area there of probably not to exceed a net of seven acres, as near as I can estimate, but at least not over an area of 15 acres, and that these pits can be refilled, seems to me to be a matter that should be taken into consideration in connection with the exercise of any equitable powers of this court in granting or refusing an injunction pendente lite.

I think the injunction pendente lite should be granted, but I think that in view of the motion to dismiss, and even though the parties have not made a motion to stay, the injunction pendente lite should be granted but that the suggestion contained in the case of Railroad Commission v. Pullman, 312 U. S. 496, should be followed. Reading from page 501:

> "Regard for these important considerations of policy (that is the policy of having regard for the right of the state to determine in its own forums the excesses or lack of them of any of its governmental agencies in violation of the state law) in the administration of federal equity jurisdiction is decisive here. If there was no warrant in the state law for the commission's assumption of [348] authority there is an end of the litigation; the constitutional issue does not arise. The law of Texas appears to furnish easy and ample means for determining

the commission's authority. Article 6453 of the Texas Civil Statutes gives a review of such an order in the state courts. (Incidentally, I think in this case there had not been a previous state action filed.) Or, if there are difficulties in the way of this procedure of which we have not been apprised, the issue of State law may be settled by appropriate action on the part of the state to enforce obedience of the order. (Citing cases and statutes.) In the absence of any showing that these obvious methods for securing a definitive ruling in the state courts cannot be pursued with full protection of the constitutional claim, the District Court should exercise its wise discretion by staying its hands.

"We therefore remand the cause to the District Court, with directions to retain the bill pending a determination of proceedings, to be brought with reasonable promptness, in the state court in conformity with this opinion."

This being a court of equity, the court has the power in granting or denying any relief to put such conditions upon it as may, in the mind of the chancellor, seem just and right.

So that the order will be that the preliminary injunction will be granted, but that all proceedings in this court will be stayed pending the final disposition of the proceedings in the state court upon the defendant Gregg filing here an appropriate bond, conditioned upon refilling such portion [349]

of the land as he shall excavate in the event the case is finally decided against him in the state court.

Now I understand from the defendant Gregg here that it was not a terrific job to refill those holes.

Mr. Crump: Would your Honor permit an interruption? I am sorry but I didn't quite get your statement.

I understood you to say that the injunction would be granted but I didn't understand you to state that there was any limitation on the injunction. In other words, whether Mr. Gregg could proceed in this limited area if he puts up a bond. Was that the sense of your statement?

The Court: The injunction will be granted, but the proceedings may be stayed—that is, the injunction may be stayed—if he puts up a bond, and I am not here pretending to determine the questions of public policy on this preliminary hearing as to the conditions under which he shall operate. The conditions of the stay will further be that any operations that he conducts there will be in conformity with the order of the state court and of the terms of the permit itself.

Now the question is on the amount of a bond which the defendant Gregg should put up, or it may be that the defendant will not wish to stay it. In the event you desire to have some time to give consideration to that, I can leave the injunction in force as it now is until next Monday.

Mr. Crump: We prefer that your Honor fix the amount of the bond at this time.

The Court: At the present time?

Mr. Crump: Yes.

The Court: I think that a bond in the penal sum of $50,000 would be sufficient if deposited on the part of the defendant Gregg and conditioned upon his refilling the land [350] in its present condition in compliance with such order of this court, the District Court, as might be made in the event the question is ultimately decided against him.

Mr. Crump: You say the order of this court. Of course that would be subject to any right of appeal.

The Court: Of course.

Mr. Crump: Yes.

Mr. Clark: May I make one statement, your Honor?

The transcript on appeal, the reporter's transcript, which was the important one in the state case, was filed yesterday and we expect expeditiously will move to the point of its certification for formal filing in the Appellate Court, and we do have in mind making an application to the Supreme Court to retain jurisdiction of the case rather than to transfer it, as it has the right to do, presently for determination by a District Court of Appeals, subject to the right to have it brought back to the Supreme Court then for final determination.

We also hope that by reason of the importance of the questions involved that the Supreme Court will set a very early date in the coming year for the consideration of that appeal. So I would feel

that probably in the next four months we might reasonably expect at least that that matter will have been briefed, argued and submitted to the Supreme Court for decision.

Now, might I ask your Honor, however, in view of our experience in encountering delays in those matters, and the fact that if Mr. Gregg does decide to go ahead, the excavated area would be much larger—would your Honor retain jurisdiction to readjust the bond upon any proper showing that any readjustment should be made?

The Court: I do not think so. I will answer that question [351] in a moment after I make another observation.

In fixing a bond in the sum of $50,000, I do not wish to be understood as fixing that as a possible measure of damages. In fixing that bond in that sum and in ordering the stay as I have done, I do not wish to be understood as saying that the parties plaintiff do or do not suffer any irreparable injury in connection with the dust and the noise and the other matters of inducement alleged in the complaint. I fix it only in that sum because I feel that it will be sufficient to warrant the refilling of the land, together with the power which exists in the District Court to enforce compliance with its orders, as indicated recently in the celebrated case of United States v. John L. Lewis, and also in the case arising in this district known as United States v. Penfield, where the Supreme Court said I had no discretion to fine a man for contempt, I could only put him in jail until he complied.

So I think that the bond in the penal sum of that amount, together with the powers of the District Court to enforce compliance with its orders in the event that it should become necessary to refill, will be sufficient and my order to stay it will be final. Of course that is always subject to reopening any decision or any matter in this court in the event conditions change and the parties desire to take advantage of such procedure as the law allows.

Another reason that induces me to fix a bond in the sum of $50,000 rather than a higher amount, because I doubt in my experience that the sum of $50,000 would refill one of those holes, is because the state Superior Court, after a long trial of the matter, did not grant the injunction.

Are there any other points that I have missed?

Mr. Clark: We are satisfied with your Honor's explanation.

Mr. Hearn: May I inquire as to what extent, if any, the [352] injunction will directly affect the City of Los Angeles?

The Court: The injunction as it is in force now restrains the City and Gregg and their agents from carrying out the terms of the permit.

Mr. Hearn: I notice the preliminary injunction in effect now——

The Court: That will be continued in force. The motion to dissolve the preliminary injunction is denied, and it will be continued in force on the same terms.

Mr. Crump: I understand then, your Honor, that while Mr. Gregg is required to put up $50,000 as a bond to dissolve the injunction, the plaintiffs only have to have a $5000 bond?

The Court: I think that is sufficient. I think the matter will work out.

Are there any other matters to be taken up?

Mr. Clark: None, your Honor.

The Court: Very well.

(Rep. Tr., p. 357, line 7, to p. 374, line 8.)

Submitted by

DONALD J. DUNNE,
WOOD, CRUMP, ROGERS,
ARNDT & EVANS.
By /s/ GUY RICHARDS CRUMP,
Attorneys for Defendant,
D. J. Gregg.

Address: 458 So. Spring Street, Los Angeles 13, Calif. [353]

Affidavit of Service by Mail

State of California,
County of Los Angeles—ss.

Anna M. Anderson, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's

business address is 458 South Spring Street, Los Angeles 13, California; that on the 7th day of January, 1948, affiant served the within and above document, "Reporter's Transcript of Evidence and Proceedings on Hearing re Preliminary Injunction and Motion to Dissolve the Same," on the plaintiffs in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said plaintiffs, at the office address of said attorneys, as follows: "Oliver O. Clark and Robert A. Smith, Suite 710, 643 South Olive Street, Los Angeles 14, California"; and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the attorneys for the person by and for whom said service was made; that there is delivery service by United States mail between the place of mailing and the place so addressed.

/s/ ANNA M. ANDERSON.

Subscribed and sworn to before me this 7th day of January, 1948.

[Seal] /s/ HERTHA N. EBERT,

Notary Public in and for the County of Los Angeles, State of California. [354]

In the United States District Court, Southern District of California, Central Division

No. 7765—P. H.

HENRY WALLACE WINCHESTER, et al.,

Plaintiffs,

vs.

J. D. GREGG, and the CITY OF LOS ANGELES, a municipal corporation,

Defendants.

PRELIMINARY INJUNCTION

To the Defendant J. D. Gregg, and to His Attorneys of Record Herein, and to the City of Los Angeles, a Municipal Corporation, and Its Attorneys of Record Herein:

In the above entitled action, plaintiffs having filed their duly verified complaint, in which, among other things, they pray for an injunction, and an order to show cause, and a temporary restraining order having heretofore issued herein, and upon the hearing of said order to show cause why a preliminary injunction should not be issued it appeared to the above entitled court that a preliminary injunction should issue in the premises,

This order shall be effective as to the property lying northerly of Glenoaks Boulevard upon the filing of a surety bond in the sum of $5,000.00 and shall be effective as to the property lying southerly

of Glenoaks Boulevard upon the filing of an additional surety [355] bond in the sum of $10,000.00, until further order of the Court.

Now, therefore, you, the defendants herein, and the said J. D. Gregg, his agents, servants and employees are hereby absolutely enjoined and restrained, during the pendency of the above entitled action and until its final determination, or until the court shall otherwise order, from excavating, or conducting any other operation for the production of rock, sand, or gravel within or upon that certain real property described in plaintiffs' complaint herein, and known and described as follows, to wit:

> Lots 1, 2, 4, 5, 6, 7, 13 and 14 in Block 19; the Easterly 150 feet of Lot 12 in Block 8; Lots 4 to 9 inclusive, and Lots 15 to 19, inclusive, and Lots 21 and 22, and the Easterly 280 feet of Lot 14, in Block 17; of the Los Angeles Land and Water Company's subdivision of a part of the Maclay Rancho as per map recorded in Book 3 of Maps at Pages 17 and 18 in the Office of the County Recorder of Los Angeles County, California.

This preliminary injunction is issued because it appears to the Court that unless immediately restrained, said defendant John D. Gregg, his agents, servants and employees will continue to excavate with a six ton power shovel upon the land covered by the variance permit described in the complaint herein, for production of rock, sand, and gravel

from said land and will remove said materials from said property, and dispose of them in the market, and that the conduct of said operations will seriously, substantially, and irreparably damage plaintiffs, by interfering with their comfortable enjoyment and use of their respective properties and homes described in the complaint herein, and depreciating the value of their said properties, respectively, and by creating a large deep pit upon the property excavated, which cannot reasonably be refilled and which will constitute permanently a hazard [356] and detriment to the health and safety of said plaintiffs and their families, and to their said properties.

Given under my hand and seal of the United States District Court, Southern District of California, Central Division, this 9th day of December, 1947, 1:34 p.m.

/s/ PEIRSON M. HALL,
Judge.

Judgment entered Dec. 9, 1947. Docketed Dec. 9, 1947. C.O. Book 47, Page 371. Edmund L. Smith, Clerk, by John A. Childress, Deputy.

[Endorsed]: Filed Dec. 9, 1947.

[Title of District Court and Cause.]

ORDER IN RE PRELIMINARY INJUNCTION AND STAY THEREOF

Good cause appearing therefor, it is hereby ordered that the preliminary injunction issued herein on December 9, 1947, and now in force be, and the same is continued in force, upon the terms and conditions therein set forth, until the further order of the Court herein; provided, however, that the operation of said preliminary injunction and all other proceedings in this case shall be stayed pending a final decision in the case of Wheeler, et al., Plaintiffs, vs. J. D. Gregg, et al., Defendants, No. 522,031 in the Superior Court of the State of California, in and for the County of Los Angeles, and which is now pending on appeal in the Supreme Court of the State of California, if, when and as defendant J. D. Gregg shall post a bond in the penal sum of $50,000.00, executed [358] by a corporate surety approved by this court, conditioned upon said defendant J. D. Gregg refilling, with reasonable diligence and according to such orders as this Court may hereafter make, such portion of the land described in the said preliminary injunction lying northerly of Glenoaks Boulevard, as he shall have excavated subsequent to December 9, 1947, if a final judgment be entered in a court of competent jurisdiction holding that said J. D. Gregg has and has had no right so to excavate; and provided, further, that any operation con-

cerned with the excavation, processing and transportation of rock, sand and gravel now contained in the lands described in said preliminary injunction, during the period of any suspension of the operation of said preliminary injunction, shall be conducted in accordance with the requirements therefor set forth in the conditional use permit granted by the City Council of the City of Los Angeles to said J. D. Gregg, dated October 2, 1946, and in accordance with the requirements set forth in the judgment heretofore made and entered in said action No. 522,031 in the Superior Court of the State of California, in and for the County of Los Angeles,

It is further ordered that the defendants' motion to dismiss be and the same is hereby denied.

It is further ordered that the motion of defendant J. D. Gregg to strike portions of the complaint be and the same is hereby denied.

It is further ordered that the motion of Defendant J. D. Gregg to dissolve the preliminary injunction be and the same is hereby denied.

Dated at Los Angeles, this 18th day of December, 1947, at 10:05 o'clock, a.m.

/s/ PEIRSON M. HALL,
Judge.

Judgment entered Dec. 18, 1947. Docketed Dec. 18, 1947. C. O. Book 47, Page 501. Edmund L. Smith, Clerk, by J. M. Horn, Deputy.

[Endorsed]: Filed Dec. 18, 1947. [359]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT COURT OF APPEALS

Notice is Hereby Given that defendant J. D. Gregg, above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the order of the United States District Court, Southern District of California, Central Division, granting a preliminary injunction herein, which order is entitled "Preliminary Injunction," dated the 9th day of December, 1947, and entered herein on the 9th day of December, 1947.

Dated: January 6, 1948.

DONALD J. DUNNE,
WOOD, CRUMP, ROGERS,
ARNDT & EVANS,
By /s/ GUY RICHARDS CRUMP,
Attorneys for Defendant,
J. D. Gregg. [360]

[Affidavit of service by mail attached.]

[Endorsed]: Filed Jan. 7, 1948.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 368, inclusive, contain full, true and correct copies of Complaint in Equity for Injunction and Damages; Temporary Restraining Order; Notice of and Motion to Dismiss for Lack of Jurisdiction of Subject-Matter; Motion to Dissolve Temporary Restraining Order; Affidavits of John D. Gregg, Donald J. Dunne, Harold A. Henry and J. Win Austin in Opposition to Preliminary Injunction; Affidavits of Louise Taylor, H. B. Lynch, Albert M. Scheble, R. L. Farley and Jeanne Moore in Support of Pending Application for Preliminary Injunction; Reporter's Transcript of Evidence and Proceedings on Hearing re Preliminary Injunction and Motion to Dissolve the Same; Preliminary Injunction; Order in re Preliminary Injunction and Stay Thereof; Notice of Appeal; Statement of Points Relied on by Appellant on Appeal from Order Granting Preliminary Injunction and Designation of Contents of Record on Appeal which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to $90.95 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 16th day of February, A. D. 1948.

[Seal] EDMUND L. SMITH,
Clerk,

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 11861. United States Circuit Court of Appeals for the Ninth Circuit. J. D. Gregg, Appellant, vs. Henry Wallace Winchester, Ernest Joseph Stewart, et al., Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed February 17, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States District Court, Southern District of California, Central Division

No. 7765—P. H.

HENRY WALLACE WINCHESTER, et al.,
Plaintiffs,

vs.

J. D. GREGG, and the CITY OF LOS ANGELES, a municipal corporation,
Defendants.

ORDER EXTENDING THE TIME FOR FILING THE RECORD ON APPEAL AND DOCKETING THE APPEAL

Upon reading and filing the affidavit of Donald J. Dunne, and good cause appearing therefor,

It Is Hereby Ordered that the time for filing the record on appeal and docketing the appeal from the order of the United States District Court, Southern District of California, Central Division, granting a preliminary injunction herein, is hereby extended to and including the 26th day of February, 1948.

Dated at Los Angeles, California, this 16th day of February, 1948, at 10 o'clock a.m.

PEIRSON M. HALL,
Judge.

A True Copy, Attest, etc., Feb. 16, 1948. Edmund L. Smith, Clerk U. S. District Court, Southern District of California. By Theodore Hocke, deputy.

[Endorsed]: Filed Feb. 16, 1948.

[Title of District Court and Cause.]

APPLICATION FOR ORDER EXTENDING THE TIME FOR FILING THE RECORD ON APPEAL AND DOCKETING THE APPEAL

State of California,
County of Los Angeles—ss.

Donald J. Dunne, being first duly sworn on oath, deposes and says:

That affiant is one of the attorneys of record in the above entitled action; that Notice of Appeal to the Circuit Court of Appeals from the order of the United States District Court, Southern District of California, Central Division, granting a preliminary injunction herein, was filed herein on the 7th day of January, 1948; that the time for filing the record on appeal and docketing the appeal has not expired; that the record on appeal herein is voluminous, consisting of the pleadings and affidavits and counter-affidavits aggregating several hundred pages and including as parts thereof and exhibits thereto certain aerial mosaic maps and photographs which it was necessary to reproduce in order to provide sufficient copies for the record on appeal; that by reason of the foregoing the preparation of said record has been delayed and that unless an extension of time for filing the record on appeal and docketing the appeal is granted, that the time prescribed by the Federal Rules of Civil

Procedure will have expired before the said record on appeal may be filed and docketed in the United States Circuit Court of Appeals for the Ninth Circuit.

Wherefore, affiant respectfully prays that the Court make its order extending for ten days the time for filing the record on appeal and docketing the appeal herein.

/s/ DONALD J. DUNNE.

Subscribed and Sworn to before me this 16th day of February, 1948.

/s/ JAMES A. MILLER,
Notary Public in and for
said County and State.

[Endorsed]: Filed (DC) Feb. 16, 1948.

[Endorsed]: Filed (CCA) Feb. 18, 1948.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11861

J. D. GREGG,

Appellant,

vs.

HENRY WALLACE WINCHESTER,

Appellee.

STATEMENT OF POINTS RELIED ON BY APPELLANT ON APPEAL FROM ORDER OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION, GRANTING A PRELIMINARY INJUNCTION

The points upon which appellant intends to rely on this appeal are as follows:

1. The court erred in not dismissing plaintiffs' complaint for failure to state a claim.

2. The District Court of the United States was without jurisdiction to grant a preliminary injunction, there being no federal question presented.

3. Where diversity of citizenship does not exist, jurisdiction of the United States District Court can be sustained only on the ground that the case arises under the Constitution of the United States, or under a federal statute, which is not the case here.

4. Plaintiffs' cause of action is essentially one to abate or enjoin a public nuisance, and is therefore an action in rem or quasi in rem.

5. The preliminary injunction should have been denied both under the provisions of Section 265 of the Judicial Code, being Section 379 of Title 28 USCA, and under the doctrine of comity.

6. The controversy as well as the right created by the Constitution or laws of the United States must be a genuine one and a present one, which is not the case here, not merely a possible or conjectural one.

7. The business of excavating rock and gravel by the owner from lands belonging to him is a lawful and useful occupation, and an ordinance prohibiting such owner from so doing is an unreasonable restraint upon the use of his property and an unwarranted interference in the carrying on of a lawful business and the use and enjoyment of property.

8. Where the operation of a business is not a nuisance per se, a decree or order should not enjoin more than the specific things which constitute the nuisance and should never go beyond the requirements of the particular case.

9. There can be and is no estoppel against the City of Los Angeles with reference to the granting of the conditional use permit to Gregg.

10. The granting of the permit to Gregg does not constitute an unconstitutional taking of the property of plaintiffs without just compensation nor does it constitute a denial of due process of law.

11. Plaintiffs may not impeach the motives of the City Council in granting the permit.

12. The wisdom or expediency of granting the permit was for the City Council to decide and is not subject to judicial review.

13. The power vested in the Planning Commission in the first instance, and in the City Council on appeal, to grant a conditional use permit under Section 12.24 of Ordinance 90,500 does not constitute an unlawful delegation of legislative authority, and does not present a federal question.

14. The court erred in granting the preliminary injunction for the reasons hereinbefore set forth.

Dated: February 25, 1948.

DONALD J. DUNNE,
WOOD, CRUMP, ROGERS,
ARNDT & EVANS,
By /s/ DONALD J. DUNNE,
Attorneys for Appellant
J. D. Gregg.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Feb. 26, 1948.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION BY APPELLANT OF THE PARTS OF THE RECORD NECESSARY FOR THE CONSIDERATION OF THE POINTS RELIED ON BY APPELLANT ON APPEAL FROM ORDER OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION, GRANTING A PRELIMINARY INJUNCTION

Appellant J. D. Gregg, through his counsel, hereby designates the entire record on appeal in this action, which appellant believes necessary to be printed for the consideration of the points relied upon by appellant on said appeal, said record consisting of the following:

1. The bill of complaint in equity.

2. Defendant J. D. Gregg's motion to dismiss the complaint.

3. Temporary restraining order, dated November 15, 1947.

4. Motion to dissolve temporary restraining order, dated November 29, 1947.

5. Affidavit of J. D. Gregg in opposition to the granting of a preliminary injunction, and exhibits thereto attached.

6. Affidavit of Donald J. Dunne, filed in behalf of defendant J. D. Gregg, in opposition to the granting of a preliminary injunction, and exhibits thereto attached.

7. Affidavit in behalf of City of Los Angeles in opposition to the granting of a preliminary injunction, and exhibits thereto attached.

8. Counter affidavits filed in behalf of plaintiffs.

9. Reporter's transcript of the evidence and proceedings (exclusive of argument of counsel).

10. Order entitled "Preliminary Injunction," dated and entered December 9, 1947.

11. Order in re Preliminary Injunction and stay thereof.

12. Notice of appeal.

13. Statement of points on which appellant intends to rely.

Dated: February 25, 1948.

DONALD J. DUNNE,
WOOD, CRUMP, ROGERS,
ARNDT & EVANS,
By /s/ DONALD J. DUNNE,
Attorneys for Appellant
J. D. Gregg.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Feb. 26, 1948.